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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

ALFREDO A., a Juvenile,

Petitioner,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF

THE STATE OF CALIFORNIA

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CONTENTS REPRODUCED FROM FURNISHED PRETYPED COPY.

QUESTION PRESENTED

This Court has determined that a person arrested without a warrant for alleged criminal conduct and thereafter detained in custody is entitled to a prompt judicial determination of probable cause (hereinafter occasionally "PCD"). Gerstein v. Pugh, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975) [hereinafter occasionally "Gerstein"]. This court has also ruled that "prompt" in this context means without unnecessary delay, and in no event in over 48 hours absent extraordinary circumstances. This court has further held that an intervening weekend or holiday does not justify delaying a PCD. County of Riverside v. McLaughlin, 500 U.S. 44, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991) [hereinafter occasionally "McLaughlin"].

The California Supreme Court has now found that if the person arrested without a warrant is a juvenile (e.g., in California, under the age of 18), the constitutionally required PCD may be delayed for up to 72 hours, and may be delayed due solely to intervening weekends or holidays in order that it may be conducted in conjunction with an arraignment.

The question thus presented by this case is whether a juvenile arrested without a warrant and thereafter detained in custody, is constitutionally entitled to a prompt judicial determination of probable cause within the meaning of Gerstein and McLaughlin. Stated otherwise, does the Constitution permit a young person arrested without a warrant and without probable cause (and thus constitutionally entitled to be released from custody) to be held in custody longer than an adult person arrested under the same circumstances?

ADDITIONAL PARTIES

The parties who have appeared in this action are those listed in the caption. Petitioner is a juvenile who was arrested without a warrant upon suspicion that he committed a criminal act, and was thereafter detained in custody without a judicial determination of probable cause for over 48 hours. The Superior Court of the State of California for the County of Los Angeles has adopted as its "official policy" that a juvenile arrested without a warrant is not entitled to a judicial determination of probable cause within 48 hours. The superior court has been represented in the proceedings underlying this petition by the Los Angeles County Counsel. These were the only parties to appear in the California Supreme Court. The prosecutorial arm of the State, the People of the State of California, did not appear in the California Supreme Court, although the California Attorney General argued on behalf of the Superior Court, and the California District Attorneys Association appeared as amicus curiae in support of the Superior Court.

Additional parties may be the People of the State of California, represented by either Gil Garcetti, District Attorney of Los Angeles County, California, or Daniel E. Lungren, Attorney General of the State of California; and Barry J. Nidorf, Chief Probation Officer of Los Angeles County, California.

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PETITION FOR WRIT OF CERTIORARI

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Petitioner Alfredo A., a juvenile, by and through his attorney Michael P. Judge, Public Defender of Los Angeles County, California, respectfully prays that a writ of certiorari issue to review the decision of the California Supreme Court permitting a juvenile arrested without a warrant to be held in custody without a prompt judicial determination of probable cause for that detention when the delay in the determination is unnecessary and in excess of 48 hours.

OPINIONS BELOW

The judgment from which this petition is taken was rendered by the California Supreme Court on January 24, 1994, in Alfredo A. v. Superior Court, 6 Cal.4th 1212, 865 P.2d 56, 26 Cal.Rptr.2d 623 (1994), which has been reproduced in the Appendix, pages A-1 through A-61. A modification to that opinion, printed at 7 Cal.4th 477d, is included in the Appendix, pages A-62 through A-63.

The judgment at issue followed a grant of rehearing from a previous decision of the California Supreme Court, which formerly appeared at 5 Cal.4th 1, 849 P.2d 1330, 18 Cal.Rptr.2d 869 (1993), and which has been reproduced in the Appendix, pages A-64 through A-123.

A prior decision was issued on December 5, 1991, by the California Court of Appeal, Second Appellate District, Division Three, which was formerly found at 13 Cal.App.4th 382, 2 Cal.Rptr.2d 73 (1991), and which is reproduced in the Appendix, pages A-124 through A-136.

JURISDICTION OF THIS COURT

The judgment at issue was rendered on January 24, 1994, and became final upon the denial of a timely petition for rehearing on March 18, 1994. The order denying rehearing is included in the Appendix, page A-137.

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(3) on the basis that the judgment of the California Supreme Court fails to guarantee that all juveniles arrested without a warrant and held in custody due to alleged criminal conduct shall have a judicial determination of probable cause conducted without unnecessary delay and in no event in no more than 48 hours absent extraordinary circumstances, thus violating petitioner's constitutional rights as guaranteed by the Fourth and Fourteenth Amendments.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Fourth Amendment:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

United States Constitution, Fourteenth Amendment (in relevant part):

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTORY AND OTHER PROVISIONS INVOLVED

The following California constitutional provisions, statutes, and rules are involved in this case which, due to their length, are reproduced in the Appendix, pages A-136 through A-143:

California Constitution, article I, section 12.
California Penal Code section 853.6, subdivision (i).
California Welfare and Institutions Code section 602.
California Welfare and Institutions Code section 626.
California Welfare and Institutions Code section 628.
California Welfare and Institutions Code section 631, subdivision (a).
California Welfare and Institutions Code section 632.
California Welfare and Institutions Code section 635.
California Code of Civil Procedure section 135.
California Government Code section 6700.
California Rules of Court, rule 987.

STATEMENT OF THE CASE

California statutory law permits a juvenile arrested without a warrant for criminal conduct to be held in custody without judicial review until his arraignment. Not until that arraignment is the juvenile statutorily entitled to a judicial determination of probable cause for his detention. The arraignment may be delayed on weekends and holidays, and may thus occur as long as seven days after the juvenile's arrest.

On July 24, 1991, petitioner Alfredo A., a minor, was taken into custody without a warrant and detained on the basis that he had engaged in conduct which would be a criminal offense if committed by an adult, and was thereafter held for over 48 hours in the absence of a judicial determination of probable cause. This was based upon the "official policy" of the Los Angeles County Superior Court that juveniles arrested without a warrant are not entitled to a PCD within 48 hours of their arrest, but only within the time provided by California statute, i.e., within three to seven days.

Petitioner filed a Petition for Writ of Habeas Corpus in the California Court of Appeal, Second Appellate District, Division Three. [1/] Petitioner sought his release from custody on the basis that his confinement for over 48 hours without a PCD violated the Fourth Amendment to the United States Constitution as interpreted by this Court in Gerstein v. Pugh, supra, 420 U.S. 103 and County of Riverside v. McLaughlin, supra, 500 U.S. 44. The Court of Appeal construed the petition as a Petition for Writ of Mandate against the "official policy" of the Los Angeles County Superior Court. On December 5, 1991, the Court of Appeal denied the petition, holding that the Fourth Amendment protection of McLaughlin does not apply to juveniles, and that

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[1/] No petition was filed in the Los Angeles County Superior Court since, in light of that court's "official policy," such a petition would have been fruitless. See Appendix, p. A-126.

a PCD conducted within seven days of a juvenile's arrest comports with federal due process requirements.

Petitioner sought review in the California Supreme Court, raising the same federal grounds for relief as presented to the Court of Appeal. On February 20, 1992, the California Supreme Court granted the petition for review, thus vacating the Court of Appeal's opinion. See Cal. Rules of Ct., rule 976(d).

On May 4, 1993, the California Supreme Court issued a decision. In a plurality opinion written by Chief Justice Lucas, three justices found that the California statutory scheme permitting a seven-day delay in arraignment was unconstitutional, and that a juvenile was entitled to an arraignment within three days not excluding weekends and holidays. The plurality considered this protection, among others not involving probable cause determinations, and concluded that delaying a PCD for up to 72 hours, or until the arraignment if the arraignment is conducted within three days, does not violate due process. The fourth concurring justice, Justice Arabian, disagreed that the issue involved due process, but found that the PCD in the case of a juvenile could be delayed for 72 hours under the Fourth Amendment, and did not place any limitation upon when an arraignment must be conducted. The three dissenting justices concluded that the Fourth Amendment requires that a juvenile, like an adult, be afforded a judicial determination of probable cause without unnecessary delay and in any event within 48 hours following a warrantless arrest.

The May 4, 1993, decision was vacated when the California Supreme Court granted rehearing on its own motion on July 15, 1993. The present decision of the California Supreme Court was issued on January 24, 1994.

In the final decision, Justice Lucas's three-justice plurality opinion continues to state that the protections available to juveniles, including an arraignment within three days (among others not involving probable cause determinations) justifies delaying the PCD for up to 72 hours, which

does not, on balance, violate due process. However, deleted from the final opinion is the prior mandate that an arraignment be conducted within three days without regard to intervening weekends or holidays, so that those proceedings may still be delayed for up to seven days. The opinion also authorizes delaying the PCD until the arraignment (if held within 72 hours), thus still permitting delay of the PCD merely due to intervening "nonjudicial" days.

Justice Arabian adheres to his opinion that the issue is not due process, but the requirements of the Fourth Amendment, but that a PCD for a juvenile can be delayed for 72 hours despite that constitutional protection. Again, the same three dissenting justices conclude that no state interest justifies additional delay in a PCD for a juvenile, and that the Fourth Amendment therefore requires that a juvenile be provided with a judicial determination of probable cause within the same time frame as an adult. [2/]

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[2/] It is noteworthy that only four justices who have considered this matter have directly addressed the Fourth Amendment issue, rather than engage in a due process analysis. Of those four justices, three concluded that the Fourth Amendment requires a PCD within 48 hours for both adults and juveniles.

REASONS FOR GRANTING THE WRIT

I

THERE IS NO BASIS FOR DENYING A DETAINED JUVENILE THE SAME PROMPT JUDICIAL DETERMINATION OF PROBABLE CAUSE CONSTITUTIONALLY REQUIRED FOR AN ADULT

Petitioner's position before this Court may be succinctly summarized with four quotations, two from this Court, and two from the dissenting Justices below:

"[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone." In re Gault, 387 U.S. 1, 13, 87 S.Ct. 1428, 1436 (1967).

"A State has no legitimate interest in detaining for extended periods individuals who have been arrested without probable cause." County of Riverside v. McLaughlin, 500 U.S. 44, 111 S.Ct. 1661, 1669 (1991).

"The presence of youth does not make up for the absence of probable cause." Alfredo A. v. Superior Court, supra, 6 Cal.4th 1212, 1244, Mosk, J., dis. (App., p. A-42).

"[T]he People have not identified any state interest that would justify incarcerating a juvenile, detained solely because law enforcement authorities believe he or she has committed a crime, for a period of time . . . longer than the time the state could detain an adult under similar circumstances." Id., 6 Cal.4th 1212, 1258, George, J., dis. (App., p. A-61).

In Gerstein v. Pugh, supra, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54, this Court held that a person arrested without a warrant was entitled to a prompt judicial determination of probable cause ("PCD") if he was to be held in custody pending trial. Thereafter, every court which has considered the issue (including every member of the California Supreme

Court in this case) has concluded that this requirement applies to all arrested persons, whether adult or juvenile. See, for example, Moss v. Weaver, 525 F.2d 1258 (5th Cir. 1976); R.W.T. v. Dalton, 712 F.2d 1225 (8th Cir. 1983); Bell v. Superior Court, 117 Ariz. 551, 574 P.2d 39 (1978); In re Roberts, 290 Ore. 441, 622 P.2d 1094 (1981); Lanes v. Texas, 767 S.W.2d 789 (Tx.Crim.App. 1989). Indeed, the concurring opinion in this case recognized that this conclusion is a "settled proposition." Alfredo A. v. Superior Court, supra, 6 Cal.4th at p. 1234, Arabian, J., conc. & dis. (App., p. A-27).

In County of Riverside v. McLaughlin, supra, 500 U.S. 44, 111 S.Ct. 1661, 114 L.Ed.2d 49, this Court refined its ruling in Gerstein, and defined the term "prompt" as meaning that an arrestee is constitutionally entitled to a PCD conducted without any unnecessary delay, and in no event in more than 48 hours, absent extraordinary circumstances. A bare majority of the California Supreme Court has held that the rule of McLaughlin is inapplicable to juveniles, who may be held in custody longer than an adult without a PCD.

This issue appears to be one of first impression in the United States. [3/] It is certainly an issue of great and continuing importance to all governmental agencies charged with the arrest and detention of juveniles, and is, of course, of extreme importance to those persons under the age of 18 who may be arrested and held in custody to await adjudication of criminal charges. It is also an issue upon which the majority of the California Supreme Court has manifestly erred.

The statutory procedures applicable to juveniles in California do not in themselves satisfy federal constitutional requirements for prompt judicial determinations of probable cause. California law provides for a PCD only when the juvenile has appeared in court for arraignment, at which time

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[3/] This may be due to the difficulties in securing a viable case in which the issue might be litigated. See, for example, L.A.E., Jr. v. Davis, 263 Ga. 473, 435 S.E.2d 216 (1993).

the juvenile is entitled to a "detention hearing," requiring a showing of a "prima facie case" that the juvenile committed an offense if he is to be further detained. Cal. Welf. & Inst. Code §§ 632, 635; In re William M., 3 Cal.3d 16, 28, 473 P.2d 737, 89 Cal.Rptr. 33 (1970). No earlier PCD is required by California statute, and the detention hearing can be unnecessarily delayed for a substantial period of time after the minor's arrest.

A juvenile will not appear in court for arraignment until after a petition seeking wardship is filed. That petition need not be filed for 48 hours after arrest, and, with one basically irrelevant exception, the minor need not be brought before the court until the first judicial day after the petition is filed. Cal. Welf. & Inst. Code §§ 631, subd. (a), 632, subd. (a). Under this statutory scheme, no juvenile is guaranteed a detention hearing within 48 hours, since the statute specifically permits a delay of arraignment for at least three days for no discernable reason other than administrative convenience. [4/]

In fact, three days is only the minimum permissible period of delay; the delay in arraignment will usually be

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[4/] In its original, now superseded, opinion, the plurality of the California Supreme Court stated, "The exception for 'nonjudicial days' (e.g., weekends and holidays) embodied in sections 631 and 632 is best characterized as a rule of convenience for the members of the judiciary, public agencies, juvenile probation department, and all others who participate in the juvenile detention proceedings. From the minor-detainee's standpoint, however, there is nothing 'convenient' about a rule that extends his or her detention hearing based solely on the fortuity of which day of the week (weekday, weekend or holiday) the arrest took place. Moreover, we find nothing characteristic of juvenile detention proceedings, in contrast to adult criminal proceedings, that would make such a rule any less injurious, or any more tolerable, under the Fourth Amendment." (App., A-88.) This discussion has been deleted from the final plurality opinion.

longer, and can be much longer in some cases, because the statutory computation of time excludes "nonjudicial days," i.e., weekends and holidays. Every Saturday and Sunday, and every other designated "holiday" (including the day after Thanksgiving) are "nonjudicial days." Cal. Code of Civ. Proc. § 135, Cal. Gov. Code § 6700. If a holiday falls on a Saturday or Sunday, the California Judicial Council may move the holiday to any other day. Cal. Code Civ. Proc. § 135. Rule 987 of the California Rules of Court provides that such holidays are to be moved to the nearest Monday or Friday. "Three-day weekends" are common, and there is at least one "four-day weekend," consisting of Thanksgiving and the three following days, each day of which is a "nonjudicial day."

Thus, a petition against a juvenile arrested on a Wednesday need not be filed until the next Friday. The minor would not have to be brought to court until the following Monday. The arraignment would be delayed for five days. The delay would be six days if the following Monday happened to be a holiday. A juvenile arrested on a Monday before California's 4-day Thanksgiving holiday could have a petition filed on Wednesday, and be held without arraignment until the next court day—Monday—a seven-day delay. In fact, the only juveniles actually guaranteed an arraignment within three days of arrest under California statute are those arrested on Monday or Tuesday. [5/]

The California Supreme Court has held that a juvenile is entitled only to the judicial review statutorily provided, despite the constitutionally unnecessary delays permitted by

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[5/] The only exception to this rule is that if the juvenile is detained for a nonviolent misdemeanor offense (not involving weapons and not committed by a juvenile on probation or parole), the delay between arrest and detention hearing cannot itself exceed 48 hours, but this period still excludes nonjudicial days. Cal. Welf. & Inst. Code § 632, subd. (b). As a practical matter, juveniles fitting into this category are almost never detained in the first place, and thus this exception to the general rule is seldom applicable.

statute, unless that arraignment is not conducted within 72 hours following arrest, in which case a PCD must be provided within those 72 hours. However, this does not comport with the standards set forth by this Court, nor is there any rational basis for departing from those standards.

In Gerstein v. Pugh, supra, 420 U.S. 103, 124-125, this Court held that the Fourth Amendment is violated if an arrestee is not provided with a prompt judicial determination of probable cause to believe he committed a criminal offense and is held in custody before trial following a warrantless arrest. In County of Riverside v. McLaughlin, supra, 500 U.S. 44, 111 S.Ct. 1661, this Court held that the probable cause determination cannot be unreasonably delayed, and that in no event could the determination be made later than 48 hours after arrest in the absence of extraordinary circumstances. The determination cannot be delayed in order for the police to seek additional probable cause, nor to accommodate an overburdened judicial system. The 48-hour period cannot exclude weekends or holidays. Although a delay of less than 48 hours in making a judicial determination of probable cause may be unconstitutional if unnecessary under the circumstances, a delay of over 48 hours is presumptively unreasonable. A system which does not guarantee such a determination within 48 hours in the absence of extraordinary circumstances can be challenged as violating federal law.

It may be seen that the system adopted by the California Supreme Court fails to comply with the Fourth Amendment's requirements in many respects. Most fundamentally, of course, it permits a PCD to be delayed for 72 hours, while this Court has held that the Fourth Amendment

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will not permit a delay of over 48 hours in a PCD. [6/] Moreover, all that a juvenile is guaranteed is an arraignment within 72 hours, and California statute permits that arraignment to be delayed solely due to administrative convenience and intervening weekends or holidays. Thus, the California system permits constitutionally unnecessary delays. This Court has already ruled that such "delay for delay's sake" is constitutionally prohibited. County of Riverside v. McLaughlin, supra, 500 U.S. 44, 111 S.Ct. at p. 1670.

There has been no claim, much less a showing, that more than 48 hours are needed to complete the administrative steps incident to a juvenile's arrest in California. In fact, experience has shown, and respondent Superior Court has admitted, that a delay of over 48 hours in a juvenile's PCD is not necessary. Alfredo A. v. Superior Court, supra, 6 Cal.4th at p. 1254, Mosk, J., dis (App., A-55-A-56). Instead, the justifications for delaying a PCD in the case of a juvenile appear to be two-fold: 1) a delayed PCD is necessary to preserve the "informality" and "flexibility" of juvenile proceedings; and 2) the procedural protections of California statutes are adequate to, on balance, fulfill the requirements of due process because they advance the interests protected by the Fourth Amendment. As shown below, neither of these purported justifications can withstand reasoned analysis.

Although petitioner recognizes that there may be situations in which constitutional imperatives must yield to the

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[6/] It is unclear how the California Supreme Court arrived at the 72-hour figure. Although the plurality opinion purports to find support in decisions of this Court, that time frame is not suggested by any decision of this Court. Perhaps the period was chosen because it is roughly equivalent to the three-day minimum delay permitted by California statute, and, as charged in the dissent below, the plurality believes that "the commands laid down by the United States Constitution should yield to the preferences indicated in California law." Alfredo A. v. Superior Court, supra, 6 Cal.4th at p. 1255, Mosk, J., dis. (App., A-57).

unique and overriding needs of the juvenile justice system, there is no rational basis for permitting lengthy and unnecessary delay in a PCD merely because the person detained is a juvenile. Both the plurality and concurring opinions below make much of the purported need for "informality" and "flexibility" in juvenile proceedings. Indeed, this purported need appears to be the only justification advanced by the concurring justice for permitting a delayed PCD. However, as this Court recognized in In re Winship, 397 U.S. 358, 90 S.Ct. 1068 (1970), mere mouthing of the words "informality" or "flexibility" cannot justify departure from constitutional standards when the procedure at issue has no effect upon either "informality" or "flexibility." 7/

Just like the "beyond a reasonable doubt" standard required by Winship, providing a PCD within 48 hours cannot "risk destruction of [the] beneficial aspects of the juvenile process." In re Winship, supra, 397 U.S. at p. 366, 90 S.Ct. at p. 1073. Providing a prompt PCD "will not disturb [State] policies that a finding that a child has violated a criminal law does not constitute a criminal conviction, that such a finding does not deprive the child of his civil rights, and that juvenile proceedings are confidential. Nor will there be any effect on the informality, flexibility, or speed of the hearing at which the factfinding takes place. * * * Similarly, there will be no effect on the procedures distinctive to juvenile proceedings that are employed prior to the adjudicatory hearing." In re Winship, supra, 397 U.S. at pp. 366-367, 90 S.Ct. at p. 1074. In short, providing a PCD within the constitutionally required 48 hours, rather than the legislatively preferred 72 hours, " 'will not compel the States to abandon or displace any of the substantive benefits of the juvenile process.' " Id., 397 U.S. at p. 367, 90 S.Ct. at p. 1074, quoting In re Gault, supra, 387 U.S. at p. 21, 87 S.Ct. at p. 1440.

7/ An accurate description of procedures utilized in one California County to provide prompt PCDs to juveniles is included in the dissenting opinion. Alfredo A. v. Superior Court, supra, 6 Cal.4th at p. 1256, Mosk, J., dis. (App., p. A-58).

Additionally, it must be recognized that the majority of this Court in McLaughlin chose the 48-hour period required for a PCD over the 24-hour period urged by the minority precisely to reach "a reasonable compromise between legitimate competing concerns." County of McLaughlin v. Riverside, supra, 500 U.S. 44, 111 S.Ct. at p. 1670. One may search the plurality and concurring opinions in Alfredo A. in vain for any suggestion of what additional concerns can justify even further delay in the case of an arrested juvenile. Petitioner can conceive of no concern which could possibly justify that delay. Accordingly, there is absolutely no merit to the assertion that a desire for "informality" or "flexibility" justifies delaying a judicial determination that there is probable cause to believe a juvenile committed an offense before that juvenile is required to remain in custody for a prolonged period of time.

The other justification relied upon by the plurality below is that due process is satisfied because the requirements of the Fourth Amendment are adequately protected by California statute. The plurality thus asserts that California statutes "are plainly designed to protect the arrested minor's Fourth Amendment rights." Alfredo A. v. Superior Court, supra, 6 Cal.4th at p. 1231 (App., p. A-23). However, the description of those statutes which follows in the plurality opinion completely belies that statement. [8/]

As defined by this Court, Fourth Amendment rights are protected only when an individuals's custodial status is validated by a prompt judicial determination that there is probable cause to believe that the person committed an offense. California statutes require merely that, within 24

[8/] In response to the plurality's claim that California's statutory protections obviate the need for a prompt PCD, Justice Mosk stated, "The short answer is that none of these 'protections' even purports to be an equivalent for a prompt judicial probable cause determination." Alfredo A. v. Superior Court, supra, 6 Cal.4th at p. 1253, Mosk, J., dis. (App., p. A-54).

hours of a juvenile's detention, a police officer write a report (which need not even be verified) asserting that there is probable cause for the arrest. Cal. Welf. & Inst. Code § 626, subd. (d). This statute does not mandate that any judicial authority review the assertion within that 24-hour period. No California statute requires any probable cause determination other than that of a police officer before a juvenile is brought to court. As stated by this Court, "a policeman's on-the-scene assessment of probable cause provides legal justification for arresting a person suspected of crime, and for a brief period of detention to take the administrative steps incident to arrest. Once the suspect is in custody, however, the reasons that justify dispensing with the magistrate's neutral judgment evaporate." Gerstein v. Pugh, supra, 420 U.S. at pp. 114-115, 95 S.Ct. at p. 863, emphasis added. Since this statute requires only a policeman's assessment of probable cause, and does not mandate a magistrate's neutral judgment, the statute obviously is not "designed to protect the arrested minor's Fourth Amendment rights."

It is true that California statutes provide that a minor must be released unless there are factors warranting detention. Cal. Welf. & Inst. Code § 628; see Alfredo A. v. Superior Court, supra, 6 Cal.4th at p. 1231 (App., pp. A-23). However, a determination, judicial or otherwise, that there is no probable cause to believe the minor has committed an offense is not one of the factors requiring release. A minor may remain confined if, for example, the juvenile is charged with violating a court order, even if there is no probable cause to support that charge. Cal. Welf. & Inst. Code § 628, subd. (a)(6). Thus, application of this statute means that a juvenile may be released when there is probable cause to believe he committed an offense, while another minor may be detained even in the absence of such probable cause. This statute is obviously not designed to protect Fourth Amendment rights.

The plurality claims that a juvenile must be released if a wardship petition is not filed within 48 hours. Alfredo A. v. Superior Court, supra, 6 Cal.4th at p. 1231 (App., p. A-23). Of course, this is not true if there is an intervening weekend or holiday, which can extend that 48-hour period by up to four

additional days. Cal. Welf. & Inst. Code § 631, subd. (a). Moreover, even if a petition is filed, there is no requirement of a judicial determination that there is probable cause for detention at that time. This statute cannot be claimed to protect Fourth Amendment rights.

Finally, the plurality notes that a juvenile is entitled to a hearing on the issue of probable cause at the time of his arraignment and "detention hearing." Alfredo A. v. Superior Court, supra, 6 Cal.4th at p. 1231 (App., p. A-23-A-24). However, as discussed above, that hearing may be delayed for up to seven days. While that hearing does, finally, result in a judicial determination of probable cause, if a determination may be delayed for seven days, and may be delayed merely due to intervening weekends or holidays, this statute cannot be found to protect Fourth Amendment rights in the manner required by this Court.

It should also be noted that California law provides that, in the absence of specific factors, an adult arrested for a misdemeanor offense must be released upon his written promise to appear. Cal. Pen. Code § 853.6, subd. (i). This protection obviously does not vitiate the requirement of a prompt PCD for an adult arrested for a misdemeanor offense and not released. No more so may such purported protections operate to deny a prompt PCD for a juvenile.

Moreover, with rare exceptions, an adult, even if arrested for an extremely serious offense, is entitled to bail prior to conviction. Cal. Const., art. I, § 12. A juvenile, however, even if detained upon the most insignificant offense, is not entitled to and cannot be granted bail. Aubry v. Gadbois, 50 Cal.App.3d 470, 123 Cal.Rptr. 365 (1975). As a result of the absence of a right to bail and the other statutory provisions applicable to juveniles, and despite the purported statutory "protections" available to juveniles, a significantly higher percentage of juveniles than adults are detained prior to trial, especially when minor offenses are involved.

Thus, neither the asserted need for "informality" and "flexibility," nor the purported protections of California

statutes, justifies delaying a PCD from the 48 hours mandated for adults to the 72 hours the California Supreme Court has permitted for juveniles.

The plurality below claims to find support for its ruling in two decisions of this Court: Reno v. Flores, 507 U.S. ___, 113 S.Ct. 1439 (1993), and Schall v. Martin, 467 U.S. 253, 104 S.Ct. 2403 (1984). The concurring justice also relies, to a lesser extent, upon Schall. However, neither decision is even on point in the discussion, and the decisions cannot be found to justify delaying a PCD for a juvenile longer than that permitted for an adult.

In Reno v. Flores, this Court discussed the conditions under which juveniles suspected of being deportable aliens might be detained. However, those juveniles could not be detained at all in the absence of a determination that there was probable cause to believe they were subject to deportation. This Court rejected the claim that alien juveniles detained with probable cause to believe they were deportable had a fundamental right to be free from physical restraint, and found that a regulation which allowed placement of such a juvenile only with a parent was not unconstitutional. Id., 507 U.S. at p. __, 113 S.Ct. at pp. 1447-1449. The issue of where and under what circumstances a juvenile may be detained when there is demonstrated probable cause justifying such detention is simply irrelevant to the issues before this Court. Petitioner does not contend that there is any constitutional infirmity in California law insofar as it concerns the detention of juveniles after a probable cause determination has been made. Thus, this portion of Reno v. Flores is obviously not on point in the present case.

The remaining portion of Flores addresses whether a juvenile is entitled to a hearing concerning probable cause before an Immigration Judge as a matter of right without request. Federal law applicable to both adults and juveniles provides that there is a right to such a hearing, but only upon request. Reno v. Flores, supra, 507 U.S. at p. ___, 113 S.Ct. at p. 1450; see 8 CFR § 242.2(c)(2) (1992). The claim made in Flores was that due process (not the Fourth Amendment)

required a different rule to be applied to juveniles. This Court rejected that claim, holding that adults and juveniles may properly be treated in the same way: "At least insofar as this facial challenge is concerned, due process is satisfied by giving the detained alien juveniles the right to a hearing before an immigration judge." Id., 113 S.Ct. at p. 1450, emphasis original.

It may be seen that, insofar as Flores concerns the right to a judicial determination of probable cause for detention, that decision placed no reliance upon any special factors applicable to juveniles alone. Indeed, this Court came to exactly the opposite conclusion: juveniles and adults are to be treated the same as regards the right to a probable cause determination by an Immigration Judge. The conclusion of the plurality below that Flores supports the proposition that juveniles and adults may be treated differently with respect to a PCD is plainly incorrect. Indeed, petitioner herein seeks precisely what was affirmed in Flores: juveniles should have the same rights as adults to be released if they are arrested without probable cause.

To demonstrate the inapplicability of Schall v. Martin one need look no further than this Court's limitation of the issues before it. The New York law therein under consideration permitted detention of a juvenile for up to 72 hours before the juvenile was brought to court. However, the validity of this 72-hour delay was not challenged in that case, and this Court expressly did not address that question: "If the juvenile is so detained [in a juvenile facility], he must be brought before the Family Court within 72 hours or the next day the court is in session, whichever is sooner. [Citation.] The propriety of such detention, prior to a juvenile's initial appearance in Family Court, is not at issue in this case." Schall v. Martin, supra, 467 U.S. at p. 257, fn. 5, emphasis added. Schall v. Martin, by its express terms, does not support the proposition that the Fourth Amendment permits

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a 72-hour delay while a juvenile remains in custody without a probable cause determination. [9/]

Moreover, this Court's decision in Schall predated this Court's decision in McLaughlin by seven years. Thus, although Schall involved the requirements of Gerstein, this Court noted that in Gerstein "We did not . . . mandate a specific time-table." Schall v. Martin, supra, 467 U.S. at p. 275, 104 S.Ct. at p. 2415. There is absolutely nothing in Schall which would indicate that this Court was therein attempting to define a time-table for a probable cause determination at all, and even less so can it be claimed that this Court was authorizing a different time-table for juveniles than for adults. The time-table was, in fact, established in McLaughlin, and it is that time-table which petitioner seeks to apply in this case.

As correctly stated by Justice George below, California's authorization of extensive incarceration of juveniles before a PCD is conducted is not supported by either Schall v. Martin or Reno v. Flores, "because neither case purported to address the propriety of an extended detention of a juvenile who could be released to the custody of his or her family but has been detained solely because he or she is suspected of committing a crime." Alfredo A. v. Superior Court, supra, 6 Cal.4th at pp. 1258-1259, George, J., dis. (App., p. A-61).

There is thus absolutely no support for the conclusion reached by the California Supreme Court that the United States Constitution will permit a 72-hour delay of a judicial determination of probable cause for a juvenile arrested

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9/ The plurality below, in its modification, claims that this fact is not "essential" to this court's analysis. Alfredo A. v. Superior Court, supra, 7 Cal.4th at p. 477d (App., p. A-62). However, what was and what was not under consideration by this Court is obviously "essential" to a correct determination of what issues this Court resolved, and which this Court left unresolved.

without a warrant, when an adult is entitled to that determination within 48-hours. There is similarly no support for the conclusion that the delay in a PCD permitted by California statute merely due to intervening weekends or holidays is constitutionally permissible for juveniles, when it is constitutionally prohibited for adults.

There is nothing in the nature of juveniles or of juvenile proceedings which could possibly justify the application of such different rules concerning PCDs for adults and minors. The result of the California Supreme Court's ruling is that a juvenile, arrested without probable cause, may nevertheless be held in custody before his necessary release by a judge for a period of time up to 50% longer than an adult arrested without probable cause. There is no constitutional justification for this disparity.

Since this appears to be the first decision reached by any State court concerning the application of McLaughlin to juvenile arrestees, and since the decision of the California Supreme Court is plainly erroneous, this court should act immediately to correct this error so that this problem will not spread to other jurisdictions, and so that the rights of all juveniles to be free from prolonged detention without a judicial determination of probable cause will be protected.

II

THIS COURT SHOULD GRANT CERTIORARI DESPITE THE MOOTNESS OF THIS ACTION

Petitioner acknowledges that this matter is moot as to him, since he was eventually released from custody by operation of California state law. However, this mootness did not defeat this litigation in the California state courts, and should not do so in this Court. As this Court has recognized, pretrial detention is by its nature temporary, and it is most unlikely that any given individual could have his constitutional claim decided on review before he is either released or convicted. See Gerstein v. Pugh, supra, 420 U.S. at p. 110, fn. 11; County of Riverside v. McLaughlin, supra, 500 U.S. 44,

111 S.Ct. at p. 1667. Accordingly, this matter is preserved for this Court's review. Due to the importance of the issue presented, and the likelihood that the issue will never be presented to this Court in a case in which the issue has not become moot, this Court should reach the merits of this action, and should grant this petition.

CONCLUSION

In Gerstein and McLaughlin this Court established that the Fourth Amendment requires that a person arrested without a warrant be provided with a judicial determination of probable cause without unnecessary delay, and in no event in more than 48 hours following arrest.

In the case of juveniles arrested without a warrant, the California Supreme Court has authorized delaying the constitutionally-required probable cause determination without necessity (i.e., due solely to intervening weekends or holidays), and for up to 72 hours. This contravenes the Fourth Amendment's requirements as set forth by this Court in Gerstein and McLaughlin.

The California Supreme Court's ruling is unsupported by any previous ruling of this Court and is unjustified by any concern unique to the juvenile system. Since the opinion at present is the only existing discussion of the applicability of McLaughlin to juveniles arrested without a warrant, a prompt and forceful repudiation of the decision is required so that this error may not be repeated and perpetuated in other jurisdictions.

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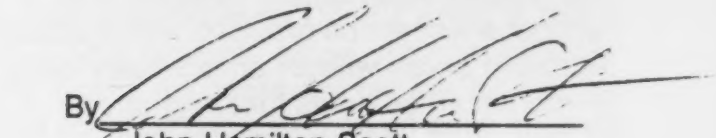
Accordingly, petitioner respectfully urges this Court to grant this petition for writ of certiorari in order to protect the Fourth Amendment rights of juveniles in California and nationwide.

Respectfully submitted,

MICHAEL P. JUDGE, PUBLIC DEFENDER
OF LOS ANGELES COUNTY, CALIFORNIA

By 

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Deputy Public Defender

Attorneys for Petitioner

APPENDIX

[6 Cal.4th 1212]

THE SUPREME COURT OF THE STATE OF CALIFORNIA

ALFREDO A., Petitioner,

v.

The SUPERIOR COURT of Los Angeles County,
Respondent;

The PEOPLE,
Real Party in Interest.

No. S024618.
Supreme Court of California,
In Bank.

January 24, 1994.

OPINION

[6 Cal.4th 1215]

LUCAS, C.J.—In Gerstein v. Pugh (1975) 420 U.S. 103 (hereafter Gerstein), the United States Supreme Court held that the Fourth Amendment requires a prompt judicial determination of "probable cause to believe the suspect has committed a crime" as a prerequisite to an extended pretrial detention following a warrantless arrest. (Id., at pp. 114, 120 [43 L.Ed.2d at pp. 65, 69].) The court stopped short of mandating a specific timetable for making a "prompt" determination of probable cause.

In County of Riverside v. McLaughlin (1991) 500 U.S. 44 [114 L.Ed.2d 49, 111 S.Ct. 1661] (hereafter McLaughlin), the high court sought to further define the "promptness" requirement for making the probable cause determination mandated in Gerstein. The court held that, "Taking into account the competing interests articulated in Gerstein, we believe that a jurisdiction that provides judicial determinations

of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement of Gerstein." (McLaughlin, supra, 500 U.S. at p. __ [114 L.Ed.2d at p. 63, 111 S.Ct. at p. 1670].)

Neither Gerstein nor McLaughlin was a juvenile detention case. In contrast, the United States Supreme Court's decision in Schall v. Martin (1984) 467 U.S. 253 [81 L.Ed.2d 207, 104 S.Ct. 2403] (hereafter Schall) did directly address the constitutional parameters of a key provision of New York state's juvenile pretrial detention statute. Schall was decided nine years after Gerstein but seven years prior to McLaughlin. Schall, and other decisions of the high court, make it abundantly clear that Fourth Amendment and related due process claims pertaining to the pretrial detention of juveniles following warrantless arrests for criminal activity cannot be viewed in the same light as similar challenges to adult detentions. This is so because, in the words of the Supreme Court, juvenile proceedings are "fundamentally different" from adult criminal proceedings, requiring that a "balance" be struck between the "informality" and "flexibility" that must of necessity inhere in juvenile proceedings, and the further requirement that those proceedings comport with the juvenile's constitutional rights, and the " 'fundamental fairness' demanded by the Due Process Clause." (Schall, supra, 467 U.S. at p. 263 [81 L.Ed.2d at p. 216].)

In July of 1991, the Los Angeles County Juvenile Court, after consultation with county counsel, adopted the "official position" that McLaughlin's strict 48-hour rule does not apply in juvenile detention proceedings. We granted review in this case to determine whether that position passes constitutional muster, or whether McLaughlin's 48-hour rule strictly applies to the

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pretrial detention of adults and juveniles alike following warrantless arrest for criminal activity. [1/]

It is beyond dispute that Gerstein's constitutional requirement of a prompt judicial determination of probable cause for the extended pretrial detention of any person arrested without a warrant applies to juveniles as well as adults. However, for reasons to be explained, and having considered the comprehensive analysis the court invoked in Schall to scrutinize the constitutionality of the juvenile detention provisions there at issue, we have concluded that the high court did not intend that the strict 48-hour rule subsequently announced in McLaughlin—a ruling handed down in a case involving the pretrial detention of adults—should automatically apply in the juvenile detention setting. To conclude otherwise, we would have to ignore the fundamental differences between adult and juvenile proceedings recognized in all of the high court's cases that have specifically addressed juvenile detention issues.

As will be explained, California's juvenile detention statutes basically afford juvenile detainees who have been arrested without a warrant a formal, adversarial "detention hearing" within 72 hours of a warrantless arrest, which proceeding incorporates the "probable cause" determination mandated under Gerstein, supra, 420 U.S. 103. The relevant statutes also prescribe various other procedures designed to ensure that an arrested juvenile will be released, in accordance with well-established and codified policies, at the earliest possible time following arrest, preferably to the custody of a parent or legal guardian. Given the fundamental

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[1/] We filed our initial opinion in this case on May 4, 1993. Although neither party petitioned for a rehearing, we ordered a rehearing on the court's own motion in order to clarify the operative effect of our holding on "detention hearings" which are mandated under the provisions of Welfare & Institutions Code section 632, subdivision (a). All further statutory references are to this Code unless otherwise indicated.

difference in purpose and procedure between the treatment of adult and juvenile detainees, we have further concluded that juvenile detainees are constitutionally entitled to a judicial "probable cause" determination within 72 hours of arrest, consistent with the integrated provisions of our juvenile detention statutory scheme.

I. FACTS AND PROCEDURAL HISTORY

On July 24, 1991, petitioner Alfredo A., a minor, was taken into custody without a warrant pursuant to Welfare & Institutions Code sections 602

[6 Cal.4th 1217]

and 625 [2/] on suspicion of having possessed cocaine base for sale on that date. (Health & Saf. Code, § 11351.5.)

On July 25, 1991, petitioner sought his immediate release by filing a petition for a writ of habeas corpus in the Court of Appeal for the Second Appellate District. He based his challenge to his postarrest detention on the holding in McLaughlin, supra, __ U.S. __ [114 L.Ed.2d 49, 111 S.Ct. 1661], alleging that he was a juvenile who had been arrested without a warrant the previous day for commission of a criminal offense, and that: "Pursuant to the Fourth Amendment to the United States Constitution, petitioner is entitled to a judicial determination of probable cause for his continued detention within 48 hours of his arrest. No such judicial determination has been made, and no determination will be made within the 48-hour period. This is because the

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[2/] Section 602 provides, in pertinent part: "Any person who is under the age of 18 years when he violates any law of this state . . . , is within the jurisdiction of the juvenile court, which may adjudge such person to be a ward of the court."

Section 625 provides, in relevant part: "A peace officer may, without a warrant, take into temporary custody a minor: [¶] (a) Who is under the age of 18 years when such officer has reasonable cause for believing that such minor is a person described in Section . . . 602 . . . ."

Los Angeles County Superior Court, Juvenile Court, has adopted as its 'official position' that a juvenile is not entitled to such a prompt probable cause determination."

Several weeks prior to petitioner's arrest, the Presiding Judge of the Los Angeles County Juvenile Court sent a memorandum to all juvenile court judges, commissioners, and referees, indicating that county counsel had furnished the juvenile court with an opinion concluding that McLaughlin's 48-hour rule does not apply in juvenile court proceedings. County counsel based that determination on the reasoning of Schall, supra, 467 U.S. 253, in which a New York juvenile "preventive detention" statute was found facially valid under the due process clause of the Fourteenth Amendment. The presiding judge and supervising judges thereafter unanimously agreed to adopt county counsel's position as the Los Angeles County Juvenile Court's "official position."

By an order to show cause filed the following day, the Court of Appeal determined to treat the petition for a writ of habeas corpus as a petition for a writ of mandate, and directed respondent Los Angeles County Superior Court to show cause why a peremptory writ of mandate should not issue ordering that judicial probable cause determinations for the extended postarrest detention of juveniles be made within 48-hours of their arrest.

On that same day, July 26, 1991, a wardship petition was filed in the juvenile court alleging petitioner came within the provisions of section 602

[6 Cal.4th 1218]

by having violated Health & Safety Code sections 11351 and 11351.5 on July 24, 1991. However, when petitioner appeared in court on the next "judicial day" (July 29, 1991), no detention report was provided to the juvenile court in preparation for the detention hearing, and petitioner was ordered immediately released. He thereafter waived the statutory time limitations for arraignment.

In the mandamus proceeding, petitioner acknowledged that his release after spending five days in

custody rendered the petition moot as to him. The Court of Appeal nonetheless determined to hear and decide petitioner's systemic challenge to the juvenile court's "official position," concluding that similar claims had proved "capable of repetition, yet evading review" because "review usually takes longer than the [challenged] temporary detention . . . ." (See Schall, supra, 467 U.S. at p. 256, fn. 3 [81 L.Ed.2d at p. 212]; Gerstein, supra, 420 U.S. at pp. 110-111, fn. 11 [43 L.Ed.2d at p. 63].)

In its opinion, the Court of Appeal reviewed the relevant provisions of the Welfare & Institutions Code governing pretrial detention of juvenile arrestees. After determining that the juvenile detention issue in this case must be evaluated in light of the constitutional analysis conducted in Schall, supra, 467 U.S. 253, the court concluded that California's statutory postarrest juvenile detention scheme withstands constitutional scrutiny, reasoning that: "[the] statutes provide procedural safeguards that accommodate the individual's right to liberty and the state's duty to control crime. They reflect the balance that must be struck between the informality and flexibility of juvenile proceedings even as they comport with the fundamental fairness required by due process. The statutory scheme protects a minor's right to freedom, consistent with the state interest in protecting the minor and society." Implicit in these conclusions was the court's rejection of petitioner's claim that McLaughlin's strict 48-hour rule applies to juvenile as well as adult postarrest detention proceedings.

II. DISCUSSION

A. Mootness of Petitioner's Claim

As noted, petitioner acknowledges that his release after spending five days in pretrial custody has technically rendered this proceeding moot as to him. The Court of Appeal nevertheless determined to hear and decide the claim. We agree that the issue, as presented in this case, is ripe for resolution. The high court reached a similar conclusion in Schall and Gerstein:

"Although the pretrial detention of the class representatives has long since ended . . . this case is not moot for the same reason that the class action in

[6 Cal.4th 1219]

Gerstein v. Pugh, 420 U.S. 103, 110, n. 11 (1975) [43 L.Ed.2d 54, 63, 95 S.Ct. 854], was not mooted by the termination of the claims of the named plaintiffs. 'Pretrial detention is by nature temporary, and it is most unlikely that any given individual could have his constitutional claim decided on appeal before he is either released or convicted. The individual could nonetheless suffer repeated deprivations, and it is certain that other persons similarly situated will be detained under the allegedly unconstitutional procedures. The claim, in short, is one that is distinctly "capable of repetition, yet evading review." ' " (Schall, supra, 467 U.S. at p. 256, fn. 3 [81 L.Ed.2d at p. 212].)

B. Relevant Statutory Provisions

In order to meaningfully examine and apply the controlling constitutional principles and case law, we need a brief overview of the relevant statutory provisions that govern juvenile detentions following warrantless arrests in California.

Under our juvenile criminal justice system, a peace officer can take a minor into temporary custody for violating a federal or state law, or a local ordinance. (§§ 602, 625, subd. (a); see, ante, at p. 1217, fn. 2.) When a minor is arrested and detained on suspicion of having committed a crime, the minor is not formally "charged" with the crime in the sense that adult arrestees are criminally prosecuted. Rather, a determination is made whether to commence wardship proceedings with the filing of a petition by the prosecuting attorney pursuant to section 602. (§ 650, subd. (c).)

Various official functions must be performed at the time of the juvenile's arrest, and within the initial 24- to 48-hour period following the arrest—all patently designed to ensure that the detained minor is afforded every reasonable

opportunity for his or her immediate release, preferably to a parent or guardian.

Hence, the arresting officer may release the minor outright (§ 626, subd. (a)), deliver him or her to a public or private shelter facility in contract with the city or county to provide shelter care, counseling, or diversion services to such minors (id., subd. (b)), or release the minor on his or her written promise to appear before a county juvenile probation officer, or to a parent, guardian, or other responsible relative, who may also be required to execute a written promise to appear along with the minor (id., subd. (c)). If the arresting officer elects instead to deliver custody of the minor directly to the county probation officer, the officer must prepare a concise, written statement of the probable cause for taking the minor into temporary custody, to

[6 Cal.4th 1220]

be furnished along with custody of the minor to the juvenile probation officer within 24 hours of the initial detention following the arrest. (Id., subd. (d).)

The policy underlying this choice of dispositions provided for in section 626 is expressly set forth in the statute: "In determining which disposition of the minor to make, the officer shall prefer the alternative which least restricts the minor's freedom of movement, provided that alternative is compatible with the best interests of the minor and the community." (§ 626, italics added.)

When custody of the minor is transferred to a probation officer at a juvenile hall or any other place of confinement, the detaining officer is further required to "take immediate steps to notify the minor's parent, guardian, or responsible relative that such minor is in custody and the place where he is being held." (§ 627, subd. (a).)

Section 628 requires the juvenile probation officer to "immediately investigate the circumstances of the minor and the facts surrounding his being taken into custody," and further requires the officer to "immediately release the minor to the custody of his parent, guardian, or responsible relative

unless one or more . . . [specified] conditions exist . . . ." (See post, at pp. 1221-1222.)

Like the arresting officer, the county juvenile probation officer is empowered with discretion at the intake-investigatory stage to "adjust the situation which brings the minor within the jurisdiction [or probable jurisdiction] of the court" by "delineat[ing] specific programs of supervision for the minor," or referring the case to another agency, arranging for informal supervision, or requesting the district attorney to prepare a wardship petition for filing. (§ 654.)

A minor taken into custody must be released within 48 hours, excluding "nonjudicial days," unless a wardship petition is filed within that initial 48-hour period. (§ 631, subd. (a).) If a section 602 petition is filed, the minor must be afforded a formal, adversarial "detention hearing" in juvenile court "as soon as possible but in any event [no later than] the expiration of the next judicial day after a petition to declare the minor a ward . . . has been filed"–i.e., 48 to 72 hours after arrest (excluding "nonjudicial days"). (§ 632, subd. (a).)

If the offense for which the minor is taken into custody is "a misdemeanor that does not involve violence, the threat of violence, or possession or use

[6 Cal.4th 1221]

of a weapon, and if the minor is not currently on probation or parole"–then the minor must be released within 48 hours after having been taken into custody (again, excluding "nonjudicial days") unless a wardship petition is filed and "the minor has been ordered detained by a judge or referee of the juvenile court pursuant to Section 635" within that initial 48-hour period. (§ 631, subd. (b).)

Most significantly, when a minor is detained on suspicion of criminal activity, in contrast to an adult detained under similar circumstances, the inquiry into the propriety of the extended detention is much broader in scope than a determination, in the strict Fourth Amendment sense, of whether "factual" probable cause exists to believe the minor

committed the crime for which he was taken into custody. Section 628 lists seven "conditions," one or more of which must be found to exist in order to warrant detaining the minor and scheduling a detention hearing within 72 hours of his or her arrest (again, excluding "nonjudicial" days). These conditions include whether:

"(1) The minor is in need of proper and effective parental care or control and has no parent, guardian, or responsible relative; or has no parent, guardian, or responsible relative willing to exercise or capable of exercising such care or control; or has no parent, guardian, or responsible relative actually exercising such care or control.

"(2) The minor is destitute or is not provided with the necessities of life or is not provided with a home or suitable place of abode.

"(3) The minor is provided with a home which is an unfit place for him by reason of neglect, cruelty, depravity or physical abuse of either of his parents, or of his guardian or other person in whose custody or care he is.

"(4) Continued detention of the minor is a matter of immediate and urgent necessity for the protection of the minor or reasonably necessary for the protection of the person or property of another.

"(5) The minor is likely to flee the jurisdiction of the court.

"(6) The minor has violated an order of the juvenile court.

"(7) The minor is physically dangerous to the public because of a mental or physical deficiency, disorder or abnormality." (§ 628, subd. (a).)

Section 635 sets forth the factors to be considered by the juvenile court at the detention hearing, and the standard the court must apply, in evaluating

[6 Cal.4th 1222]

the probation officer's findings pursuant to section 628 and determining whether to continue the minor's detention or order his or her release from custody. The section provides:

"The court will examine such minor, his parent, guardian, or other person having relevant knowledge, hear such relevant evidence as the minor, his parent or guardian or their counsel desires to present, and, unless it appears that such minor has violated an order of the juvenile court or has escaped from the commitment of the juvenile court or that it is a matter of immediate and urgent necessity for the protection of such minor or reasonably necessary for the protection of the person or property of another that he be detained or that such minor is likely to flee to avoid the jurisdiction of the court, the court shall make its order releasing such minor from custody. [¶] The circumstances and gravity of the alleged offense may be considered, in conjunction with other factors, to determine whether it is a matter of immediate and urgent necessity for the protection of the minor or reasonably necessary for the protection of the person or property of another that the minor be detained." (§ 635.)

The minor and his or her parent or guardian have the right to be represented by counsel at every stage of the detention proceedings. (§ 633.) If the minor or the parent or guardian are indigent or cannot otherwise afford an attorney, counsel will be appointed by the court. (§ 634.) In any case in which it appears to the court that there is a conflict of interest between a parent or guardian and the minor, separate counsel may be appointed for the minor and the parent or guardian. (Ibid.)

As is evident from the foregoing summary of the relevant statutory provisions, the determination whether to detain a minor following a warrantless arrest for criminal activity is a complex one, requiring consideration of various factors personal to the minor and his family situation (§ 628), and the application of several important statutory presumptions favoring the minor's early release to a parent, guardian or responsible relative (§§ 626, 628, 631, subd. (a)), or, if extended detention is warranted, selection of the detention alternative most "compatible with the best interests of the minor . . . ," and "which least restricts the minor's freedom of movement" (§ 626). These presumptions, and the

policies they implement, are unique to juvenile detention proceedings and are not implicated when a judicial determination is made whether factual probable cause exists to extend the detention of an adult arrestee.

Bearing these distinctions in mind, we turn next to the opinions in Gerstein, supra, 420 U.S. 103, Schall, supra, 467 U.S. 253, McLaughlin,

[6 Cal.4th 1223]

supra, 500 U.S. 44 [114 L.Ed.2d 49, 111 S.Ct. 1661], and most recently, Reno v. Flores (1993) 507 U.S. __ [123 L.Ed.2d 1, 113 S.Ct. 1439] (hereafter Flores), to see if those decisions will support an inference that the high court intended the strict 48-hour rule announced in McLaughlin to apply in juvenile detention proceedings.

C. Applicability of McLaughlin's 48-Hour Rule to Juvenile Detention Proceedings

In Gerstein, supra, 420 U.S. 103, the United States Supreme Court held unconstitutional Florida procedures under which persons arrested without a warrant could be kept in police custody for 30 days or more without a probable cause determination. The court held that the Fourth Amendment requires a prompt judicial determination of "probable cause to believe the suspect has committed a crime" as a prerequisite to an extended pretrial detention following a warrantless arrest. (Id., at pp. 114, 120 [43 L.Ed.2d at pp. 65, 69].)

In McLaughlin, supra, __ U.S. __ [114 L.Ed.2d 49, 111 S.Ct. 1661], the court reiterated some of the competing policy concerns underlying its earlier holding in Gerstein:

"In reaching this conclusion we attempted to reconcile important competing interests. On the one hand, States have a strong interest in protecting public safety by taking into custody those persons who are reasonably suspected of having engaged in criminal activity, even where there has been no prior opportunity for a prior judicial determination of probable cause. 420 U.S., at 112 [43 L.Ed.2d at page 64].

On the other hand, prolonged detention based on incorrect or unfounded suspicion may unjustly 'imperil [a] suspect's job, interrupt his source of income, and impair his family relationships.' Id., at 114 [43 L.Ed.2d at page 65]. We sought to balance these competing concerns by holding that States 'must provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty, and this determination must be made by a judicial officer either before or promptly after arrest.' Id., at 125 [43 L.Ed.2d at pages 71-72] (emphasis added).

"[We] thus established a 'practical compromise' between the rights of individuals and the realities of law enforcement. Id., at 113 [43 L.Ed.2d at page 65]. Under Gerstein, warrantless arrests are permitted but persons arrested without a warrant must promptly be brought before a neutral magistrate for a judicial determination of probable cause. Id., at 114 [43 L.Ed.2d at page 65]. Significantly, the Court stopped short of holding that

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jurisdictions were constitutionally compelled to provide a probable cause hearing immediately upon taking a suspect into custody and completing booking procedures. We acknowledged the burden that proliferation of pretrial proceedings places on the criminal justice system and recognized that the interests of everyone involved, including those persons who are arrested, might be disserved by introducing further procedural complexity into an already intricate system. Id., at 119-123 [43 L.Ed.2d at pages 68-71]. Accordingly, we left it to the individual States to integrate prompt probable cause determinations into their differing systems of pretrial procedures. Id., at 123-124 [43 L.Ed.2d at pp. 70-71]." (McLaughlin, supra, 500 U.S. at p. __ [114 L.Ed.2d at pp. 60-61, 111 S.Ct. at p. 1668].)

In Gerstein, the court explained that the Fourth Amendment does not require that the arrestee be afforded the "full panoply of adversary safeguards—counsel, confrontation, cross-examination, and compulsory process for witnesses" in connection with a judicial determination of probable cause. (Gerstein, supra, 420 U.S. at p. 119 [43 L.Ed.2d at p. 68].)

The court delineated the scope of that determination as follows: "The sole issue is whether there is probable cause for detaining the arrested person pending further proceedings . . . . The standard is the same as that for arrest. That standard—probable cause to believe the suspect has committed a crime—traditionally has been decided by a magistrate in a nonadversary proceeding on hearsay and written testimony . . . ." (Id., at p. 120 [43 L.Ed.2d at p. 69], fn. omitted.)

In contrast, the constitutional parameters of juvenile detentions were directly at issue in Schall, supra, 467 U.S. 253, a case decided nine years after Gerstein, supra, 420 U.S. 103. In Schall, the court found the juvenile "preventive detention" provisions of the New York Family Court Act facially valid under the due process clause of the Fourteenth Amendment. The New York statute authorized the detention of a juvenile arrested for the commission of a crime when there is a "serious risk" the juvenile "may before the return date commit an act which if committed by an adult would constitute a crime." (Schall, supra, 467 U.S. at p. 255 [81 L.Ed.2d at p. 211], fn. omitted.)

Whereas the sole issue in Gerstein was whether there was factual probable cause to detain the adult arrestee pending further proceedings—i.e., the same standard as that for arrest: "probable cause to believe the suspect has committed a crime" (Gerstein, supra, 420 U.S. at p. 120 [43 L.Ed.2d at p. 69])—Schall makes it abundantly clear that, where juvenile detentions are concerned, such a factual probable cause determination is but one component of the broader inquiry implicated in the determination whether to extend the

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pretrial detention of a juvenile arrested without a warrant for criminal activity.

In Schall, three juveniles were detained for more than six days before being afforded a "probable cause" hearing—the functional equivalent of a "detention hearing"—pursuant to the provisions of the New York Family

Court Act. (Schall, supra, 467 U.S. at pp. 257-260 [81 L.Ed.2d at pp. 212-214].) The juveniles were brought before the family court for an "initial appearance" within one day following their arrests. (Ibid.) Under New York law, at the "initial appearance" the family court judge makes a preliminary determination as to the jurisdiction of the court, appoints counsel, and advises the minor of his or her rights. (Id., at pp. 257-258, fn. 5 [81 L.Ed.2d at pp. 212-213].) If the family court is not in session, the "initial appearance" must be conducted "within 72 hours or the next day the court is in session, whichever is sooner." (Schall, supra, 467 U.S. at pp. 257-258, fn. 5 [81 L.Ed.2d at pp. 212-213, quoting the New York Family Court Act, § 307.3(4).)

The high court first explained in Schall: "There is no doubt that the Due Process Clause is applicable in juvenile proceedings. 'The problem,' we have stressed, 'is to ascertain the precise impact of the due process requirement upon such proceedings.' In re Gault, 387 U.S. 1, 13-14 [18 L.Ed.2d 527, 538-539, 87 S.Ct. 1428] (1967). We have held that certain basic constitutional protections enjoyed by adults accused of crimes also apply to juveniles. See id., at 31-57 [18 L.Ed.2d at pages 548-563] (notice of charges, right to counsel, privilege against self-incrimination, right to confrontation and cross-examination); In re Winship, 397 U.S. 358 [25 L.Ed.2d 368, 90 S.Ct. 1068] (1970) (proof beyond a reasonable doubt); Breed v. Jones, 421 U.S. 519 [44 L.Ed.2d 346, 95 S.Ct. 1779] (1975) (double jeopardy). But the Constitution does not mandate elimination of all differences in the treatment of juveniles. See, e.g., McKeiver v. Pennsylvania, 403 U.S. 528 [29 L.Ed.2d 647, 91 S.Ct. 1976] (1971) (no right to jury trial). The State has 'a parens patriae interest in preserving and promoting the welfare of the child,' Santosky v. Kramer, 455 U.S. 745, 766 [71 L.Ed.2d 599, 615, 102 S.Ct. 1388] (1982), which makes a juvenile proceeding fundamentally different from an adult criminal trial. We have tried, therefore, to strike a balance—to respect the 'informality' and 'flexibility' that characterize juvenile proceedings, In re Winship, supra, at 366 [25 L.Ed.2d at page 377], and yet to ensure that such proceedings comport with the 'fundamental fairness' demanded by the Due Process Clause. Breed v.

Jones, supra, at 531 [44 L.Ed.2d at page 356]; McKeiver, supra, at 543 [29 L.Ed.2d at pages 659-660] (plurality opinion)." (Schall, supra, 467 U.S. at p. 263 [81 L.Ed.2d at p. 216].)

The court in Schall did initially indicate, in a footnote to its opinion, that the propriety of any detention "prior to a juvenile's initial appearance in

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Family Court" was not directly at issue in that case. (Schall, supra, 467 U.S. at pp. 257-258, fn. 5 [81 L.Ed.2d at pp. 212-213].) This was so because the petitioners had been afforded an "initial appearance," and therefore were not directly challenging the period of detention from arrest until their first appearance in court. But one must read on in Schall, for the high court had elected to decide the class members' facial challenge to the constitutionality of the New York juvenile preventive detention statute even though petitioners' individual cases were moot due to their release from custody. (Schall, supra, 467 U.S. at p. 256, fn. 3 [81 L.Ed.2d at p. 212].) The court then went on to consider the "initial appearance" requirement along with the other procedural components of the statutory juvenile detention scheme. Acknowledging that the "initial appearance" could be adjourned for up to 72 hours, and that "the Family Court judge is not required to make a finding of probable cause at the initial appearance," the court nevertheless concluded that the lack of a requirement that factual probable cause be determined at the "initial appearance" "[did] not, under the circumstances, amount to a deprivation of due process." (Schall, supra, 467 U.S. at pp. 275-276, and fn. 27 [81 L.Ed.2d at pp. 224-225].)

The high court went on to explain that New York's preventive detention statute served the dual legitimate state objectives of protecting both society and the juvenile from the hazards of further criminal activity, by undertaking enforcement of the criminal law for the sake and protection of the community generally, while also serving as parens patriae for the benefit of the minor-detainee. (Schall, supra, 467 U.S. at pp. 264-274 [81 L.Ed.2d at pp. 216-224].) The court

ultimately concluded the procedural protections afforded postarrest juvenile detainees under the New York statute satisfied the requirements of the due process clause of the Fourteenth Amendment, and found the statutory scheme facially valid. (Ibid.)

For purposes of responding to petitioner's Fourth Amendment claim in this case, it is important to note that the high court in Schall, in scrutinizing the constitutional claims of the class members therein, examined all the procedural components of New York's statutory scheme–the "initial appearance" requirement (for appointment of counsel and advisement of rights); the formal "probable cause" hearing that followed 72 hours thereafter (analogous to our "detention hearing"); and the "factfinding hearing" (analogous to our "jurisdictional hearing")–and concluded that, taken together, they comprised "[such] flexible procedures [as] have been found constitutionally adequate under the Fourth Amendment, see Gerstein v. Pugh [supra, 420 U.S. 103], and under the Due Process Clause, see Kent v. United

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States [(1966) 383 U.S. 541], at 557 [16 L.Ed.2d 84, 95, 86 S.Ct. 1045]." (Schall, supra, 467 U.S. at p. 277 [81 L.Ed.2d at p. 225], italics added.) [3/]

[3/] This court has likewise observed that in the context of juvenile wardship proceedings, a minor's constitutional right to be free from unreasonable searches, seizures and arrests derives not only from the guarantee of freedom from unreasonable searches and seizures embodied in the Fourth Amendment to the United States Constitution and article I, section 13, of the California Constitution, but also from the minor's constitutional rights to privacy, and the guarantee under the Fourteenth Amendment against deprivation of liberty without due process of law. (See, e.g., In re William G. (1985) 40 Cal.3d 550, 557 [221 Cal.Rptr. 118, 709 P.2d 1287], and cases cited; Skelton v. Superior Court (1969) 1 Cal.3d 144, 149 [81 Cal.Rptr. 613, 460 P.2d 485].)

Seven years after Schall was decided, the high court decided McLaughlin, supra, 500 U.S. 44 [114 L.Ed.2d 49, 111 S.Ct. 1661]. The court set out in McLaughlin to further define the "promptness" requirement for making the Fourth Amendment probable cause determination required under Gerstein. The court concluded: "a jurisdiction that provides judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement of Gerstein." (McLaughlin, supra, 500 U.S. at p. __ [114 L.Ed. at p. 63, 111 S.Ct. at p. 1670].)

Unlike Schall, the facts in McLaughlin did not present the court with an opportunity to reach or discuss the Fourth Amendment probable cause requirement in the specific context of juvenile detention proceedings. Critically, the court had no occasion in McLaughlin to consider the fundamental necessity, in the administration of juvenile criminal justice systems, to "strike a balance . . . respect[ing] the 'informality' and 'flexibility' that characterize juvenile proceedings [citation] . . . [while ensuring] that such proceedings comport with the 'fundamental fairness' demanded by the Due Process Clause. [Citations.]." (Schall, supra, 467 U.S. at p. 263 [81 L.Ed.2d at p. 216].)

Most recently, however, the high court had the opportunity, in a post-McLaughlin case, to reaffirm some of the constitutional principles found relevant to juvenile detentions in Schall. In Flores, supra, 507 U.S. __ [123 L.Ed.2d 1], a class of alien juveniles who had been arrested by the Immigration and Naturalization Service (hereafter INS) on suspicion of being deportable were detained pending deportation hearings pursuant to a regulation (8 C.F.R § 242.24 (1992)) providing for the release of detained minors only to their parents, close relatives, or legal guardians, except in unusual and compelling circumstances. Pursuant to a consent decree entered into in the litigation, juveniles who were not released under the regulation's provisions had to be placed in juvenile care facilities that met or exceeded state licensing requirements for the provision of such services to dependent

children. The juvenile class members in Flores contended they had a right under the federal Constitution and immigration laws to be routinely released into the custody of other "responsible adults."

Relying on principles reiterated in its earlier opinions in Santosky v. Kramer (1982) 455 U.S. 745 [71 L.Ed.2d 599, 102 S.Ct. 1388], and Schall, supra, 467 U.S. 253, the court reaffirmed that the State's parens patriae interest in "preserving and promoting the welfare of the child" (Santosky v. Kramer, supra, 455 U.S. at p. 766 [71 L.Ed.2d at p. 615]) renders juvenile proceedings fundamentally different from adult criminal proceedings. The court once again emphasized that " 'juveniles, unlike adults, are always in some form of custody,' Schall, supra, [467 U.S.] at 265, and where the custody of the parent or legal guardian fails, the government may (indeed, we have said must) either exercise custody itself or appoint someone else to do so. Ibid." (Flores, supra, 507 U.S. at p. __ [123 L.Ed.2d at p. 17], italics in original.)

The high court in Flores therefore rejected the respondent class members' "procedural due process" claim under the Fifth Amendment. [4/] The court's conclusions regarding the constitutionality of the INS juvenile detention procedures under scrutiny in that case bear repeating here, for they reinforce our conclusion that the high court's analysis that gave rise to the strict 48-hour rule announced in McLaughlin does not, in isolation, adequately address all of

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[4/] The due process claim in Flores arose under the Fifth Amendment because aliens have a right to due process of law at deportation proceedings under the Fifth Amendment. (Flores, supra, 507 U.S. at p. __ [123 L.Ed.2d at pp. 19-20]; see The Japanese Immigrant Case (1903) 189 U.S. 86, 100-101 [47 L.Ed. 721, 725-726, 23 S.Ct. 611].) The discussion of Fifth Amendment procedural due process in Flores is functionally analogous to the Fourteenth Amendment procedural due process discussed in Schall.

the constitutional concerns that arise in juvenile postarrest detention cases.

The court in Flores explained that the deportation process ordinarily begins with a warrantless arrest by an INS officer who has reason to believe that the arrestee is in the United States in violation of an immigration law or regulation and is likely to escape before a warrant can be obtained. (Flores, supra, 507 U.S. at p. __ [123 L.Ed.2d at p. 20].) Arrested aliens are almost always offered the choice of departing the country voluntarily, and the great majority apparently take that course. By statute, however, before the INS can seek execution of a voluntary departure form by a juvenile arrestee, the juvenile must communicate with either a parent, adult relative, friend, or with an organization found on the free legal services list. If the juvenile does not seek voluntary departure, the relevant statutes require that he or she be brought before an INS examining officer within 24 hours of his or her arrest.

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The "examining officer" must be someone other than the arresting officer, but is still a staff member of the INS's enforcement division, and is not a judge or magistrate. If the examiner finds prima facie evidence that the arrested alien is illegally in the United States, a formal deportation hearing is initiated through the issuance of an order to show cause, and within 24 hours the decision is made whether to continue the alien juvenile in custody or to release him. (Ibid. [123 L.Ed.2d at p. 20].)

The INS must notify the alien juvenile of the commencement of a deportation proceeding, and of the decision as to custody, by serving a written form notice in English and Spanish. The front of the form notifies the alien of the allegations against him or her and the date of his deportation hearing. The back contains a section entitled "Notice of Custody Determination," in which the INS officer checks a box indicating whether the alien will be detained in the custody of the INS, released on his or her own recognizance, or released under bond. The form also advises the alien that he or she may request the "Immigration Judge"

to redetermine the custody decision. The "Immigration Judge" is a quasi-judicial officer in the Executive Office for Immigration Review, a division "separated" from the INS enforcement staff. The alien juvenile must check one of two boxes, indicating he or she does or does not seek such review, and sign and date the form. If the alien requests a hearing before the "Immigration Judge" and is dissatisfied with the outcome, he or she may obtain further review by the Board of Immigration Appeals, and by the federal courts. (Flores, supra, 507 U.S. at pp. __-__ [123 L.Ed.2d at pp. 20-21].)

The high court in Flores rejected the conclusion of the United States District Court and the in bank Court of Appeals for the Ninth Circuit that the INS procedures are flawed because they do not provide for automatic review by an "Immigration Judge" of the initial deportability and custody determinations. The court explained: "At least insofar as this facial challenge is concerned, due process is satisfied by giving the detained alien juveniles the right to a hearing before an immigration judge." (Flores, supra, 507 U.S. at p. __, italics in original [123 L.Ed.2d at p. 21].) The court further rejected respondents' contention that the regulations were infirm because they failed to set forth a time period within which the hearing before the "Immigration Judge," when requested, must be held. (Ibid.)

In rejecting respondents' further claim that "the regulation is an abuse of discretion because it permits the INS, once having determined that an alien juvenile lacks an available relative or legal guardian, to hold the juvenile indefinitely," the court explained: "That is not so. The period of custody is inherently limited by the pending deportation hearing, which must be concluded with 'reasonable dispatch' to avoid habeas corpus. 8 U.S.C.

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§ 1252(a)(1); cf. [United States v. Salerno], 481 U.S. 739, 747 [95 L.Ed.2d 697, 708-709] (1987) (noting time limits placed on pretrial detention by the Speedy Trial Act). It is expected that alien juveniles will remain in INS custody an average of only 30 days [under the terms of the consent decree] . . . . There

is no evidence that alien juveniles are being held for undue periods pursuant to regulation 242.24 [8 C.F.R. § 242.24 (1992)], or that habeas corpus is insufficient to remedy particular abuses." (Flores, supra, 507 U.S. at p. __, fn. omitted [123 L.Ed.2d at pp. 24-25].)

The court concluded in Flores: "We think the INS policy now in place is a reasonable response to the difficult problems presented when the Service arrests unaccompanied alien juveniles. It may well be that other policies would be even better, but 'we are [not] a legislature charged with formulating public policy.' Schall v. Martin, 467 U.S., at 281 [81 L.Ed.2d at page 228]. On its face, INS regulation 242.24 accords with both the Constitution and the relevant statute." (Flores, supra, 507 U.S. at p. __, [123 L.Ed.2d at p. 25].)

We recognize, of course, that the holding in Flores is of limited precedential value here, since that case arose under the due process clause of the Fifth Amendment (but see ante, at p. 1228, fn. 4), involved a class of deportable juvenile aliens who may not have enjoyed the same Fourth Amendment rights as juvenile citizens (see United States v. Verdugo-Urquidez (1990) 494 U.S. 259, 265-275 [108 L.Ed.2d 222, 233-239, 110 S.Ct. 1056), and involved the interpretation of immigration statutes as well as the terms of a consent decree. We nonetheless believe that the underpinnings of the high court's constitutional analysis in Flores, supra, 507 U.S. __ [123 L.Ed.2d 1], and its express reliance in that case on several of the basic principles pertaining to juvenile detentions discussed in Schall, supra, 467 U.S. 253, reinforce our conclusion that, in the context of juvenile detention proceedings, the high court would not today find rigid application of the 48-hour rule of McLaughlin, supra, 500 U.S. 44 [111 S.Ct. 1661] compelled under a strict application of Fourth Amendment principles.

We emphasize that we do not today suggest a juvenile arrestee facing postarrest detention has no Fourth Amendment liberty interest in a prompt determination of the legal cause for his or her extended detention. The Fourth Amendment principles at the core of the holding in Gerstein,

supra, 420 U.S. 103, apply to juveniles as well as adults. The high court expressly reaffirmed as much eight years ago in Schall, supra, 467 U.S. at pp. 264, 276-277, and fn. 27 [81 L.Ed.2d at pages 217, 224-225]. Indeed, although the court in Schall twice characterized its earlier holding in Gerstein to be "that a judicial determination of probable cause is a prerequisite to any

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extended restraint on the liberty of an adult accused of crime" (Schall, supra, 467 U.S. at pp. 274-275, italics added [81 L.Ed.2d at p. 224]), we think that such characterization cannot, in reason or fairness, be understood as an attempt by the court to limit the fundamental principles announced in Gerstein solely to adult detentions. The court subsequently made it clear in Schall that children have a protected liberty interest in "freedom from institutional restraints." (Id., at p. 265 [81 L.Ed.2d at p. 217]; see In re Gault (1967) 387 U.S. 1, 27 [18 L.Ed.2d 527, 545-546, 87 S.Ct. 1428].)

California's postarrest juvenile detention statutes are plainly designed to protect the arrested minor's Fourth Amendment rights. The arresting officer must, within 24 hours of the arrest, prepare a written summary of the probable cause for taking the minor into temporary custody. (§ 626, subd. (d).) In contrast to adult criminal proceedings, the statutory presumptions require "immediate release" of the minor to the custody of his or her parents or legal guardian unless specific factors warranting extended detention are found to exist. (§ 628.) Even when such factors supportive of further detention are found to exist, the juvenile arrestee must nonetheless be released within 48 hours unless a wardship petition is filed within that initial 48-hour period. (§ 631, subd. (a).) And, if a wardship petition is filed, a formal, adversarial detention hearing, which incorporates a probable cause determination, and at which counsel is provided for both the minor and his parents or guardian, must be conducted "as soon as possible but in any event [no later than] the expiration of the next judicial day after a petition to declare the minor a ward . . . has been filed" (i.e., no later than 72 hours after arrest, excluding "nonjudicial days"). (§ 632, subd. (a).) At that detention hearing, the juvenile court

will consider "[t]he circumstances and gravity of the alleged offense" in determining whether extended pretrial detention is warranted under all the facts and circumstances. (§ 635.)

In light of the foregoing, we therefore conclude that the United States Supreme Court's adoption of the strict 48-hour rule in McLaughlin, supra, 500 U.S. 441 [111 S.Ct. 1661] was neither foreseen nor intended by that court to be rigidly operable in juvenile postarrest detention proceedings. Given the fundamental differences between juvenile and adult detention proceedings recognized in a long line of that court's decisions, we will not infer otherwise, absent an express and definitive ruling from the high court to the contrary.

As has been shown, our Legislature, in its wisdom, has enacted a comprehensive statutory scheme governing postarrest juvenile detentions, that is designed to implement specific policies and procedures deemed to be in the juvenile detainees' best interests, while balancing their fundamental constitutional rights against the well recognized need for "informality" and "flexibility" in juvenile criminal justice systems. (Schall, supra, 467 U.S. at p.

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263 [81 L.Ed.2d at p. 216].) Our juvenile courts, of course, are duty bound to comply with both constitutional and statutory requirements. Having examined the integrated components of California's juvenile detention statutes, we conclude that the Constitution, as interpreted by the United States Supreme Court's pertinent decisions reviewed herein, requires no more than that juvenile arrestees be afforded a judicial determination of "probable cause" for any postarrest detention extending beyond the 72-hour period immediately following a warrantless arrest.

In light of these conclusions, it follows that the formal detention hearing provided for in section 632, subdivision (a), may also serve to fulfill the constitutional requirement when the court at such a hearing, where it is held within 72 hours of the juvenile's arrest, makes a determination that sufficient probable cause exists for the extended postarrest detention of the juvenile. Consistent with our analysis and conclusions

herein, if the 72-hour period immediately following arrest includes one or more "nonjudicial days," such that the juvenile court is unable or unwilling to provide a full statutory detention hearing within that period, then the Constitution independently requires that the juvenile be afforded a separate, timely judicial determination of probable cause for any extended period of detention beyond the 72 hours following arrest. [5/]

III. CONCLUSION

The judgment of the Court of Appeal is affirmed

Panelli, J., and Baxter, J., concurred.

ARABIAN, J., Concurring and Dissenting.—I concur in the lead opinion in so far as it requires prompt probable cause determinations for juveniles within 72 hours of warrantless arrest. (See lead opn., ante, this page.) I respectfully dissent, however, from the due process analysis by which the lead opinion reaches this conclusion. Petitioner does not dispute his postarrest detention on that basis; nor does he raise such a challenge to any provision of the Juvenile Court Law governing wardship detentions in general (Welf. & Inst. Code, § 602 et seq.). Rather, he asserts that, like any adult in comparable circumstances, a detained minor is entitled to a probable cause determination of suspected criminal activity within 48 hours of a

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[5/] We note further that, in 1992, the Legislature added subdivision (c) to Code of Civil Procedure section 134, which specifically provides: "In any superior, municipal, or justice court, one or more departments of the court may remain open and in session for the transaction of any business which may come before the department in the exercise of the civil or criminal jurisdiction of the court, or both, on a judicial holiday or at any hours of the day or night, or both, as the judges of the court prescribe." (Stats. 1992, ch. 460, § 2.)

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warrantless arrest as mandated by the United States Supreme Court's decision in County of Riverside v. McLaughlin (1991) 500 U.S. 44 [114 L.Ed.2d 49, 111 S.Ct. 1661] (McLaughlin). As framed by petitioner, the only issue before us is whether the rule of McLaughlin applies to juveniles. [1/] Accordingly, we are constrained to refract his contentions solely through a Fourth Amendment prism, for that is the limited nature of the constitutional claim. (Cf. Gerstein v. Pugh (1975) 420 U.S. 103, 111 [43 L.Ed.2d 54, 63, 95 S.Ct. 854] ["Both the standards and procedures for arrest and detention have been derived from the Fourth Amendment and its common-law antecedents."].) The specificity of the question demands an equally precise answer, not the due process circuity submitted in the lead opinion. (See, e.g., New Jersey v. T.L.O. (1985) 469 U.S. 325 [83 L.Ed.2d 720, 105 S.Ct. 733] [4th Amend. search and seizure claim].)

While I agree with Justice Mosk that we should pursue a Fourth Amendment tack in resolving this case, I conclude that for juvenile detainees a probable cause determination within 72 hours satisfies the constitutional mandate of "promptness." I am unpersuaded McLaughlin, supra, 501 U.S. 44 [111 S.Ct. 1661] is dispositive or controlling here. Factually, that case involved only adults. In assessing the protections afforded minors, the United States Supreme Court

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[1/] Indeed, as the lead opinion notes (ante, p. 1217), the original habeas corpus petition challenged the "official position" of the Los Angeles County Superior Court, based on an opinion of county counsel, that juveniles are not entitled to a prompt probable cause determination under McLaughlin, supra, 500 U.S. 44 [111 S.Ct. 1661].

For this reason, I agree with Justice Mosk and Justice George that the lead opinion is nonresponsive and therefore unpersuasive to the extent the analysis relies on Schall v. Martin (1984) 467 U.S. 253, a case decided on Fourteenth Amendment due process grounds, and Reno v. Flores (1993) __ U.S. __ [123 L.Ed.2d 1, 113 S.Ct. 1439], a Fifth Amendment due process decision.

has consciously "refrained . . . from taking the easy way with a flat holding that all rights constitutionally assured for the adult accused are to be imposed on the state juvenile proceeding." (McKeiver v. Pennsylvania (1971) 403 U.S. 528, 545 [29 L.Ed.2d 647, 661, 91 S.Ct. 1976]; id., at p. 541 [29 L.Ed.2d at pp. 658-659].) Thus, I do not construe the holding in McLaughlin to extend perforce to juveniles simply because it does not expressly restrict its scope to adults. In my view, the issue warrants an independent examination, bearing in mind both the general nature of the Fourth Amendment guaranty with its rubric of reasonableness and the particularized concerns of the juvenile justice system. (403 U.S. at p. 545 [29 L.Ed.2d at p. 661; cf. New Jersey v. T.L.O., supra, 469 U.S. at pp. 337-343 [83 L.Ed.2d at pp. 731-736].)

Since any official detention can adversely affect a minor as critically and undeniably as it does an adult, juveniles do have a protectible liberty interest

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with respect to such restraint even though they are generally subject to greater restriction of their freedom by virtue of their minority. (Schall v. Martin, supra, 467 U.S. at p. 265 [81 L.Ed.2d at pp. 217-218].) Moreover, while juveniles do not ipso facto possess the same constitutional rights as adults (see, e.g., New Jersey v. T.L.O., supra, 469 U.S. at p. 342, fn. 8 [83 L.Ed.2d at p. 735]), it is now a settled proposition that the "promptness" requirement of Gerstein v. Pugh, supra, 420 U.S. at pages 111-116 [43 L.Ed.2d at pages 63-67], embraces all warrantless detentions regardless of the detainee's age. (See, e.g., R.W.T. v. Dalton (8th Cir. 1983) 712 F.2d 1225, 1230; Moss v. Weaver (5th Cir. 1976) 525 F.2d 1258, 1259-1260.) The question remains, however, to quantify the mandate of Gerstein for juveniles as the United States Supreme Court has done for adults in McLaughlin, supra, __ U.S. at page __ [111 S.Ct. at page 1670]. Although we lack a direct answer, decisions of the high court provide some useful contours to the analytical framework.

In general, the juvenile context is highly relevant in determining whether and to what extent a particular constitutional principle applies to minors. (See, e.g., Schall v.

Martin, supra, 467 U.S. at p. 265 [81 L.Ed.2d at pp. 217-218].) Depending upon the interest at stake, this circumstance may dictate that juveniles have rights coextensive with adults, may debar them entirely, or may necessitate some modification of rights. (See McKeiver v. Pennsylvania, supra, 403 U.S. at pp. 533-534 [29 L.Ed.2d at pp. 653-654].)

For example, in McKeiver v. Pennsylvania, supra, 403 U.S. 528, the Supreme Court declined to extend the right of jury trial to juvenile adjudications. (Id., at p. 545 [29 L.Ed.2d at p. 661].) In the court's view, superimposing this requirement on such proceedings would not appreciably enhance the factfinding process, while at the same time it would impair the laudatory, if not always successful, goals of the system. (Id., at pp. 547-550 [29 L.Ed.2d at pp. 662-664].) On the other hand, the court has ruled that minors are entitled to proof beyond a reasonable doubt (In re Winship (1970) 397 U.S. 358, 368 [25 L.Ed.2d 368, 377-378, 90 S.Ct. 1068]) and the defense of double jeopardy (Breed v. Jones (1975) 421 U.S. 519, 531 [44 L.Ed.2d 346, 356, 95 S.Ct. 1779]) to the same extent these guaranties protect adults because "there is little to distinguish" between adjudications and criminal trials relative to the underlying constitutional principles. (Id., at p. 530 [44 L.Ed.2d at p. 356].) In each instance, the minimal infringement on the traditional informality of juvenile proceedings did not outweigh the substantial concerns of the minor in the fair determination of delinquency and a limitation on multiple hearings. (Id., at pp. 536-539 [44 L.Ed.2d at pp. 359-361]; In re Winship, supra, 397 U.S. at pp. 366-368 [25 L.Ed.2d at pp. 376-378].)

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In other cases, the Supreme Court has sought to harmonize the protectible interests of minors with their correlative constitutional underpinnings. In the seminal case of In re Gault (1967) 387 U.S. 1 [18 L.Ed.2d 527, 87 S.Ct. 1428], it determined that a juvenile's right to due process when taken into custody for suspected criminal activity included, inter alia, the privilege against self-incrimination. (Id., at p. 55 [18 L.Ed.2d at p. 561].) At the same time, the court acknowledged "that special problems may arise with

respect to waiver of the privilege by or on behalf of children, and that there may well be some differences in technique—but not in principle—depending upon the age of the child and the presence and competence of parents." (Ibid.; see also id., at pp. 33-34 [18 L.Ed.2d at pp. 549-550] [due process requires notice of charges to juvenile's parents as well as juvenile]; Haley v. Ohio (1948) 332 U.S. 596, 599-601 [92 L.Ed.2d 224, 228-229, 68 S.Ct. 302] [admissions and confessions of juveniles require special caution].)

In New Jersey v. T.L.O., supra, the court considered "what limits, if any, the Fourth Amendment places on the activities of school authorities" who search students. (469 U.S. at p. 332 [83 L.Ed.2d at p. 735].) Although school children have an expectation of privacy (id., at pp. 337-339 [83 L.Ed.2d at pp. 731-733]), the need to maintain order in the classroom "requires some easing of the restrictions to which searches by public authorities are ordinarily subject." (Id., at p. 340 [83 L.Ed.2d at p. 733].) Thus, in striking the balance of reasonableness, considerations unique to their particular circumstance qualified the scope of constitutional protection available to juveniles.

Regardless of its ultimate conclusion in these cases, the Supreme Court has continually emphasized in its analyses the need to maintain a measure of flexibility to accommodate the special attention with which our society still endeavors to treat youthful offenders. (See, e.g., New Jersey v. T.L.O., supra, 469 U.S. at p. 340 [83 L.Ed.2d at p. 733]; Breed v. Jones, supra, 421 U.S. at p. 540 [44 L.Ed.2d at pp. 361-362]; McKeiver v. Pennsylvania, supra, 403 U.S. at p. 547 [29 L.Ed.2d at p. 662].) I believe this concern to maximize individualized response is particularly relevant to the question of probable cause determinations because the detention of juveniles implicates additional considerations related to their minority. (See lead opn., ante, pp. 1219-1222.) It also segues with the explicit premise of the Fourth Amendment, which proscribes only "unreasonable" seizures. (Cf. New Jersey v. T.L.O., supra, 469 U.S. at pp. 340-341 [83 L.Ed.2d at pp. 733-734].)

These collateral matters do not necessarily preclude probable cause determinations within a shorter period; indeed, as both Justice Mosk and Justice George argue in their dissents, every effort should be made to minimize the

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period of detention at this juncture in the adjudicatory process. Nevertheless, they provide a rational basis on which to premise some latitude beyond the 48-hour limit delineated in McLaughlin. (Cf. Schall v. Martin, supra, 467 U.S. at pp. 265-266 [81 L.Ed.2d at pp. 217-218].) Moreover, even with respect to adult detentions, the Supreme Court has reiterated that "probable cause determinations must be prompt—not immediate" to maintain a necessary measure of " 'flexibility' and 'experimentation' " within each state's criminal justice system. (McLaughlin, supra, 500 U.S. at p. __ [114 L.Ed.2d at pp. 61-62, 111 S.Ct. at p. 1669]; see Gerstein v. Pugh, supra, 420 U.S. at p. 123 [420 L.Ed.2d at pp. 71-72].) These latter considerations are all the more significant in the juvenile justice system, which seeks to provide intervention and rehabilitation not simply punishment. (See, e.g., Welf. & Inst. Code, §§ 626, 626.5, 628, 628.1.)

I therefore conclude that under the Fourth Amendment the circumstances of a juvenile differ sufficiently from those of an adult that the "promptness" requirement of Gerstein v. Pugh, supra, 420 U.S. 103 is satisfied if a juvenile detainee is provided a probable cause determination within 72 hours following a warrantless arrest with no extension of time for nonjudicial days. (Cf. McLaughlin, supra, __ U.S. at p. __ [114 L.Ed.2d at p. 64, 111 S.Ct. at p. 1671] ["Under Gerstein, jurisdictions may choose to combine probable cause determinations with other pretrial proceedings, so long as they do so promptly."].)

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DISSENTING OPINION BY MOSK, J.

MOSK, J.—I dissent.

The Fourth Amendment to the United States Constitution—one of the core provisions of the Bill of Rights—declares: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." [1/]

In Gerstein v. Pugh (1975) 420 U.S. 103, 111-116, 123-125 [43 L.Ed.2d 54, 63-67, 70-72, 95 S.Ct. 854] (hereafter sometimes Gerstein), the United States Supreme Court held that the Fourth Amendment mandates, as a prerequisite to extended restraint of liberty, a prompt judicial determination that there is probable cause to believe that a person has in fact committed a criminal offense following a warrantless arrest based on suspicion thereof.

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In County of Riverside v. McLaughlin (1991) 500 U.S. 44, __ [114 L.Ed.2d 49, 63-64, 111 S.Ct. 1661, 1670] (hereafter sometimes McLaughlin), the court defined "promptness" under Gerstein as generally within 48 hours of the warrantless arrest.

Thus, under the Fourth Amendment as construed by Gerstein and McLaughlin, a law-abiding person wrongfully arrested without a warrant is guaranteed his freedom within about 48 hours.

[1/] The Fourth Amendment, of course, is applicable to the states through the due process clause of the Fourteenth Amendment. (Wolf v. Colorado (1949) 338 U.S. 25, 27-28 [93 L.Ed. 1782, 1785-1786, 69 S.Ct. 1359], overruled on another point, Mapp v. Ohio (1961) 367 U.S. 643, 643-660 [6 L.Ed.2d 1081, 1083-1093, 81 S.Ct. 1684, 84 A.L.R.2d 933].)

Today, a majority of this court refuse to honor that guaranty when the person in question happens to be a juvenile.

I cannot join in such a breach of our constitutional obligation.

I

On July 25, 1991, petitioner Alfredo A. submitted a petition for writ of habeas corpus to the Court of Appeal for the Second Appellate District. His allegations were to the following effect.

On July 24, 1991, petitioner, who was then 16 years of age, was arrested in Los Angeles without a warrant for possession of cocaine base for sale. (Health & Saf. Code, § 11351.5.) He was placed in the custody of the probation department in juvenile hall. He was, or would soon be, restrained of his liberty in violation of the Fourth Amendment without a prompt judicial probable cause determination within 48 hours of his warrantless arrest, as required by Gerstein and McLaughlin. As a general matter, the Juvenile Court Law (Welf. & Inst. Code, § 200 et seq.) does not mandate such a determination for a juvenile. It does, however, specify a formal, adversarial probable cause or "detention" hearing as many as seven days after a juvenile's warrantless arrest. (Id., § 632 et seq.) The superior court sitting as the juvenile court had earlier adopted as its "official position"—in accordance with a requested opinion by the county counsel based on Schall v. Martin (1984) 467 U.S. 253 [81 L.Ed.2d 207, 104 S.Ct. 2403] (hereafter sometimes Schall)—that Gerstein's promptness requirement, at least as defined by McLaughlin, is not applicable to juveniles.

Through these allegations, petitioner effectively made a "systemic" Fourth Amendment challenge to the superior court's "official position." In his prayer for relief, he sought immediate release from custody or an immediate judicial probable cause determination.

On July 26, 1991, Division Three of the Court of Appeal for the Second Appellate District caused its clerk to issue an order (1) deeming petitioner's

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submission to be a petition for writ of mandate against the superior court and (2) directing that court to show cause why a peremptory writ of mandate should not issue compelling it to comply with Gerstein's promptness requirement, as defined by McLaughlin, with regard to juveniles as well as adults. The superior court subsequently filed opposition as respondent.

Also on July 26, 1991, the People submitted a petition to the juvenile court to declare petitioner a ward of the court. (Welf. & Inst. Code, § 602.) They alleged that he came within its jurisdiction on the ground that on July 24, 1991, he was in possession of cocaine (Health & Saf. Code, § 11351) and cocaine base (Id., § 11351.5) for sale.

On July 29, 1991, petitioner was brought to the juvenile court and released from custody, apparently because the probation department had not submitted a detention report. He waived time for arraignment. The matter was then continued to August 19, 1991. Further proceedings, if any, are not reflected in the record.

On December 5, 1991, rejecting petitioner's systemic Fourth Amendment challenge to the superior court's "official position," the Court of Appeal denied his petition. At the outset, it determined that the issue presented, even though moot as to petitioner because of his release from custody, remained suitable for resolution because, in words it quoted from Gerstein, the underlying question was " 'capable of repetition, yet evading review.' " (Gerstein v. Pugh, supra, 420 U.S. at p. 110, fn. 11 [43 L.Ed.2d at p. 63].) It then set out to answer the question posed, viz., whether the superior court's "official position" is contrary to the Fourth Amendment as construed by Gerstein and McLaughlin, by addressing a question not posed, viz., whether the Juvenile Court Law is compatible with "fundamental fairness" under the Fourteenth Amendment's due process clause as interpreted in Schall. It

purported to hold that the superior court's "official position" did not offend the Fourth Amendment.

On January 8, 1992, petitioner filed a petition for review. On February 20, 1992, we granted his request in order to determine whether Gerstein's promptness requirement is applicable to juveniles and, if so, whether McLaughlin's definition of "promptness" operates in this setting. On May 4, 1993, we handed down our original "decision," which comprised four opinions, none commanding more than three votes. On July 15, 1993, we ordered rehearing on our own motion.

II

Before the issue on which this court granted review may properly be resolved, its suitability of resolution must be addressed. Little discussion is

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called for. In fact, the words the Court of Appeal quoted from Gerstein are sufficient: the point is " 'capable of repetition, yet evading review.' " (Gerstein v. Pugh, supra, 420 U.S. at p. 110, fn. 11 [43 L.Ed.2d at p. 63].) As the Gerstein court explained: "Pretrial detention is by nature temporary, and it is most unlikely that any given individual could have his constitutional claim decided on appeal before he is either released or convicted. The individual could nonetheless suffer repeated deprivations, and it is certain that other persons similarly situated will be detained under the allegedly unconstitutional procedures." (Ibid.)

III

The question before the court is bipartite. Is Gerstein's promptness requirement applicable to juveniles? If so, does McLaughlin's definition of "promptness" operate in this setting?

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A

In Gerstein, the United States Supreme Court held that the Fourth Amendment mandates a prompt judicial probable cause determination as a prerequisite to extended restraint of liberty following a warrantless arrest. (Gerstein v. Pugh, supra, 420 U.S. at pp. 111-116, 123-125 [43 L.Ed.2d at pp. 63-67, 70-72].)

In reaching this conclusion, the Gerstein court sought to reconcile or at least accommodate an individual's Fourth Amendment rights and the state's legitimate interest in law enforcement. (Gerstein v. Pugh, supra, 420 U.S. at pp. 111-113 [43 L.Ed.2d at pp. 63-65].)

Under what the Gerstein court called its "practical compromise," "a policeman's on-the-scene assessment of probable cause provides legal justification for arresting a person suspected of crime, and for a brief period of detention to take the administrative steps incident to arrest. Once the suspect is in custody, however, the reasons that justify dispensing with the magistrate's neutral judgment evaporate. There no longer is any danger that the suspect will escape or commit further crimes while the police submit their evidence to a magistrate. And, while the State's reasons for taking summary action subside, the suspect's need for a neutral determination of probable cause increases significantly. The consequences of prolonged detention may be more serious than the interference occasioned by arrest. Pretrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships. [Citations.] Even pretrial release may be accompanied by burdensome conditions that effect a significant restraint of

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liberty. [Citation.] When the stakes are this high, the detached judgment of a neutral magistrate is essential if the Fourth Amendment is to furnish meaningful protection from unfounded interference with liberty." (Gerstein v. Pugh, supra, 420 U.S. at pp. 113-114 [43 L.Ed.2d at pp. 64-65].)

Thus, the Gerstein court made plain that the prompt judicial probable cause determination mandated by the Fourth Amendment must be "prompt" in terms of the time that is required for the state "to take the administrative steps incident to arrest" (Gerstein v. Pugh, supra, 420 U.S. at p. 114 [43 L.Ed.2d at p. 64]), such as booking, photographing, and fingerprinting (County of Riverside v. McLaughlin, supra, __ U.S. at p. __ [114 L.Ed.2d at p. 64, 111 S.Ct. at p. 1671]).

The Gerstein court also made plain that this prompt judicial probable cause determination does not require the "full panoply of adversary safeguards" of "counsel, confrontation, cross-examination, and compulsory process . . . ." (Gerstein v. Pugh, supra, 420 U.S. at p. 119 [43 L.Ed.2d at p. 68].) Rather, "a nonadversary proceeding [based] on hearsay and written testimony" is sufficient. (Id. at p. 120 [43 L.Ed.2d at p. 69].) "The sole issue is whether there is probable cause for detaining the arrested person pending further proceedings. This issue can be determined reliably without an adversary hearing. The standard is the same as that for arrest. That standard—probable cause to believe the suspect has committed a crime—traditionally has been decided by a magistrate in a nonadversary proceeding on hearsay and written testimony . . . ." (Ibid., fn. omitted.) The court noted: "Because the standards [for arrest and detention] are identical, ordinarily there is no need for further investigation before the probable cause determination can be made." (Id. at p. 120, fn. 21 [43 L.Ed.2d at p. 64].)

The Gerstein court "recognize[d] that state systems of criminal procedure vary widely. There is no single preferred pretrial procedure, and the nature of the probable cause determination usually will be shaped to accord with a State's pretrial procedure viewed as a whole." (Gerstein v. Pugh, supra, 420 U.S. at p. 123 [43 L.Ed.2d at p. 71].) It also "recognize[d] the desirability of flexibility and experimentation by the States. It may be found desirable, for example, to make the probable cause determination at the suspect's first appearance before a judicial officer, [citation], or the determination may be incorporated into the procedure for setting bail or fixing other conditions of pretrial release. In

some States, existing procedures may satisfy the requirement of the Fourth Amendment. Others may require only minor adjustment . . . ." (Id. at pp. 123-124 [43 L.Ed.2d at p. 71], fn. omitted.) But it declared: "Whatever procedure a State may adopt, it must provide a fair and reliable determination of probable cause as a condition for any significant

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pretrial restraint of liberty, and this determination must be made by a judicial officer . . . promptly after arrest" when the arrest itself is made without a warrant. (Id. at pp. 124-125 [43 L.Ed.2d at pp. 71-72], fn. omitted.)

B

In McLaughlin, the United States Supreme Court undertook to define "promptness" under Gerstein. (County of Riverside v. McLaughlin, supra, 500 U.S. at p. __ [114 L.Ed.2d at p. 57, 111 S.Ct. at p. 1665].) The facts there are similar to those here. At issue was Riverside County's policy of combining judicial probable cause determinations with its arraignment procedures, which resulted in a delay of as many as seven days after a person's warrantless arrest. The Courts of Appeals were in conflict as to the meaning of "promptness." The Fourth, Seventh, and Ninth Circuits declared or suggested that a judicial probable cause determination is "prompt" only if it is provided immediately after the state has "take[n] the administrative steps incident to arrest" (Gerstein v. Pugh, supra, 420 U.S. at p. 114 [43 L.Ed.2d at p. 65]). (See Fisher v. Washington Metro. Area Transit Authority (4th Cir. 1982) 690 F.2d 1133, 1139-1140; Llaguno v. Mingey (7th Cir. 1985) 763 F.2d 1560, 1567-1568 (in bank); McLaughlin v. County of Riverside (9th Cir. 1989) 888 F.2d 1276, 1278, vacated sub nom. County of Riverside v. McLaughlin, supra, 500 U.S. 44 [111 S.Ct. 1661].) The Second Circuit held against the requirement of "immediacy." (See Williams v. Ward (2d Cir. 1988) 845 F.2d 374, 385-386.)

The McLaughlin court adhered to, and indeed reaffirmed, the holding of Gerstein that the Fourth Amendment mandates a prompt judicial probable cause determination as a prerequisite to extended restraint of liberty following a

warrantless arrest. (County of Riverside v. McLaughlin, supra, 500 U.S. at pp. __-__ [114 L.Ed.2d at pp. 59-62, 111 S.Ct. at pp. 1667-1669].)

The McLaughlin court also remained faithful to Gerstein's view that "promptness" must be measured in terms of the time that is required for the state "to take the administrative steps incident to arrest" (Gerstein v. Pugh, supra, 420 U.S. at p. 114 [43 L.Ed.2d p. 65]). (See County of Riverside v. McLaughlin, supra, 500 U.S. at p. __ [114 L.Ed.2d at p. 64, 111 S.Ct. at p. 1671].) In its own words: "Under Gerstein, jurisdictions may choose to combine probable cause determinations with other pretrial proceedings, so long as they do so promptly. This necessarily means that only certain proceedings are candidates for combination. Only those proceedings that arise very early in the pretrial process–such as bail hearings and arraignments–may be chosen." (Id. at p. __ [114 L.Ed.2d at p. 64, 111 S.Ct. at p. 1671].) The reason is plain. To allow "promptness" to be defined with

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reference to other "steps" that a state might desire to "take" beyond those "incident to arrest"–for example, the holding of a preliminary examination–would render the requirement nugatory. A federal constitutional mandate that is designed to constrain the states cannot be dependent on the individual policy choices that any given state might happen to make.

All the same, the McLaughlin court recognized that the bare mandate of a "prompt" judicial probable cause determination had proved inadequate. It stated: "Unfortunately, as lower court decisions applying Gerstein have demonstrated, it is not enough to say that probable cause determinations must be 'prompt.' This vague standard simply has not provided sufficient guidance. Instead, it has led to a flurry of systemic challenges to city and county practices, putting federal judges in the role of making legislative judgments and overseeing local jailhouse operations." (County of Riverside v. McLaughlin, supra, 500 U.S. at p. __ [114 L.Ed.2d at p. 62, 111 S.Ct. at p. 1669].)

The McLaughlin court declined to hold that a judicial probable cause determination is "prompt" only if it is provided immediately after the state has "take[n] the administrative steps incident to arrest" (Gerstein v. Pugh, supra, 420 U.S. at p. 114 [43 L.Ed.2d at p. 65]). It stated: "Taking into account the competing interests articulated in Gerstein, we believe that a jurisdiction that provides judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement of Gerstein. For this reason, such jurisdictions will be immune from systemic challenges." (County of Riverside v. McLaughlin, supra, 500 U.S. at p. __ [114 L.Ed.2d at p. 63, 111 S.Ct. at p. 1670].)

The McLaughlin court then added: "This is not to say that the probable cause determination in a particular case passes constitutional muster simply because it is provided within 48 hours. Such a hearing [2/] may nonetheless violate Gerstein if the arrested individual can prove that his or her probable cause determination was delayed unreasonably." (County of Riverside v. McLaughlin, supra, 500 U.S. at p. __ [114 L.Ed.2d at p. 63, 111 S.Ct. at p. 1670].) But "[w]here an arrested individual does not receive a probable cause determination within 48 hours, the calculus changes. In such a case, the arrested individual does not bear the burden of proving an unreasonable delay. Rather, the burden shifts to the government to demonstrate the

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existence of a bona fide emergency or other extraordinary circumstance. The fact that in a particular case it may take longer than 48 hours to consolidate pretrial proceedings does not qualify as an extraordinary circumstance. Nor, for that

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2/ At this and a few other places in McLaughlin, the court referred to a "probable cause hearing" as the subject of Gerstein. "But this unfortunate phrase (used much less often than the more accurate term, 'probable cause determination') should not be taken to suggest an adversary hearing is required." (2 LaFave, Search and Seizure (2d ed. 1994 pocket supp.) § 5.1, p. 123, fn. 198.4.)

matter, do intervening weekends. A jurisdiction that chooses to offer combined proceedings must do so as soon as is reasonably feasible, but in no event later than 48 hours after arrest." (Id. at p. __ [114 L.Ed.2d at p. 63, 111 S.Ct. at p. 1670].)

It must be noted that McLaughlin was not a unanimous decision. In a dissenting opinion in which Justice Blackmun and Justice Stevens joined, Justice Marshall would have defined "promptness" under Gerstein to incorporate the "immediacy" requirement, i.e., a judicial probable cause determination is "prompt" only if it is provided immediately after the state has "take[n] the administrative steps incident to arrest" (Gerstein v. Pugh, supra, 420 U.S. at p. 114 [43 L.Ed.2d at p. 65]). (County of Riverside v. McLaughlin, supra, 500 U.S. at p. __ [114 L.Ed.2d at p. 64, 111 S.Ct. at p. 1671] (dis. opn. of Marshall, J.).) In a separate dissenting opinion, Justice Scalia would have adopted a similar definition. (Id. at pp. __-__ [114 L.Ed.2d at pp. 65-70, 111 S.Ct. at pp. 1672-1675] (dis. opn. of Scalia, J.).) He would also have rejected the court's "outer time limit" of 48 hours in favor of a line drawn at "certainly no more than 24 hours." (Id. at p. __ [114 L.Ed.2d at p. 70, 111 S.Ct. at p. 1676] (dis. opn. of Scalia, J.).) [3/]

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[3/] In Jenkins v. Chief Justice of Dist. Court (1993) 416 Mass. 221, __, __ [619 N.E.2d 324, 332, 335], the Supreme Judicial Court of Massachusetts recently held in the course of a scholarly and unanimous opinion that Article 14 of the Massachusetts Declaration of Rights, the state constitutional counterpart to the later-adopted Fourth Amendment, "embodies the common law guarantee that a warrantless arrest must be followed by a judicial determination of probable cause no later than reasonably necessary to process the arrest and to reach a magistrate," and that, "in the usual circumstance, no more than a twenty-four hour time period is needed to reach the magistrate."

IV

As stated above, the question before this court is whether Gerstein's promptness requirement is applicable to juveniles and, if so, whether McLaughlin's definition of "promptness" operates in this setting.

A

The first issue is the applicability of Gerstein's promptness requirement to juveniles.

Gerstein declares, both expressly and impliedly, from beginning to end, that the Fourth Amendment's protection extends to "persons" or "individuals." It does not purport to limit the constitutional guaranty to adults or even to qualify its benefit to juveniles.

[6 Cal.4th 1244]

I find no reason within Gerstein's four corners to cabin its conclusion. The Gerstein court did not itself choose to restrict the scope of the requirement that it established. I decline to do what it did not.

Neither do I discern outside Gerstein any ground to delimit its holding.

It was firmly established almost a decade before Gerstein was handed down that "the Bill of Rights is [not] for adults alone." (In re Gault (1967) 387 U.S. 1, 13 [18 L.Ed.2d 527, 538, 87 S.Ct. 1428].)

Indeed, this court itself has expressly held that among the rights of the United States Constitution to which juveniles are entitled "is the guarantee of freedom from unreasonable searches and seizures contained in the Fourth Amendment . . . ." (In re William G. (1985) 40 Cal.3d 550, 557 [221 Cal.Rptr. 118, 709 P.2d 1287]; accord, e.g., People v. Chard (Colo. 1991) 808 P.2d 351, 353 [holding that the "constitutional guarantees" to which juveniles are entitled include "protection from unreasonable searches and seizures

under the fourth amendment"]; In re Fingerprinting of Juvenile (1989) 42 Ohio St.3d 124, 126 [537 N.E.2d 1286, 1287] [stating that "it is well-settled that a juvenile is as entitled as an adult to the constitutional protections of the Fourth Amendment"]; Roberts v. Mills (1981) 290 Ore. 441, 444 [622 P.2d 1094, 1097] [holding in substance that the Fourth Amendment covers juveniles as well as adults].)

To be sure, the particular commands and prohibitions of the Fourth Amendment may vary in some respects for adults and juveniles. The basic criterion of the constitutional provision is, of course, "reasonableness." (E.g., Florida v. Jimeno (1991) 500 U.S. 248, __ [114 L.Ed.2d 297, 302, 111 S.Ct. 1801, 1803] ["The touchstone of the Fourth Amendment is reasonableness."].)

Whatever differentiation may be justified in some areas for adults and juveniles under the Fourth Amendment is not justified here. In McLaughlin, the court predicated Gerstein's promptness requirement on the proposition that "[a] State has no legitimate interest in detaining for extended periods individuals who have been arrested without probable cause." (County of Riverside v. McLaughlin, supra, 500 U.S. at p. __ [114 L.Ed.2d at p. 62, 111 S.Ct. at p. 1669].) This applies to all individuals—whether or not they have attained the age of majority. When probable cause is lacking, detention is unsupported as a matter of law. That proposition does not depend on how old the detainee is. The presence of youth does not make up for the absence of probable cause.

I recognize that the state, as parens patriae, may have a legitimate interest in detaining a juvenile for criminal activity prior to trial. That interest,

[6 Cal.4th 1245]

however, is not served by holding Gerstein's promptness requirement inapplicable. Without question, an adult arrested without probable cause must be released as soon as reasonably possible. The reason: grounds for detention are lacking. So too, a juvenile arrested without probable cause must be released as soon as reasonably possible. The reason is the same. Absent probable cause, the state's

exercise of its power to preserve and promote the welfare of the child is without support. For juveniles as for adults, Gerstein's promptness requirement operates to conserve and allocate resources by limiting the class of detainees to those who are properly subject to detention. Of course, the state, as parens patriae, may have a legitimate interest in detaining a juvenile for reasons unrelated to criminal activity. But no such interest is implicated here.

I also recognize that, in detaining a juvenile for criminal activity prior to trial, the state may use means and/or facilities different from those it uses for adults. That fact, however, is not determinative. It simply cannot be said that the restraint of liberty imposed on a juvenile is somehow less significant, in and of itself, than that imposed on an adult. Indeed, "[p]retrial detention is an onerous experience, especially for juveniles . . . ." (Moss v. Weaver (5th Cir. 1976) 525 F.2d 1258, 1260, italics added; see In re William M. (1970) 3 Cal.3d 16, 30-31 [89 Cal.Rptr. 33, 473 P.2d 737] [to similar effect].)

Moreover, it appears that since Gerstein was decided, all reported decisions that have considered the question to resolution have held or stated, expressly or impliedly, that Gerstein is applicable to all "persons" or "individuals," juveniles as well as adults. (See, e.g., R.W.T. v. Dalton (8th Cir. 1983) 712 F.2d 1225, 1230 [holding that under Gerstein, "juveniles who are detained because they are suspected of committing criminal acts must be afforded a prompt probable-cause hearing"—thereby deciding a question left open in United States v. Allen (8th Cir. 1978) 574 F.2d 435, 439 & fn. 11]; Moss v. Weaver, supra, 525 F.2d at pp. 1259-1260 [holding that Gerstein's promptness requirement is applicable to juveniles]; JV-114246 v. Superior Court (Ct.App. 1988) 159 Ariz. 357, 358 [767 P.2d 705] [same], following Bell v. Superior Court in & for Cty. of Pima (Ct.App. 1977) 117 Ariz. 551, 553-554 [574 p.2d 39] [same]; J.T. v. O'Rourke in and for the Tenth Jud. Dist. (Colo. 1982) 651 P.2d 407, 409 [holding that under Gerstein, "a juvenile who is detained is entitled to a preliminary [probable cause] hearing by constitutional mandate"]; Roberts v. Mills, supra, 290 Ore. at

p. 444 [622 P.2d at p. 1097] [holding in substance that Gerstein's promptness requirement is applicable to juveniles].)

Therefore, I conclude that Gerstein's promptness requirement is indeed applicable to juveniles.

[6 Cal.4th 1246]

B

The second issue is whether McLaughlin's definition of "promptness" operates in the juvenile setting.

McLaughlin declares, both expressly and impliedly, from beginning to end, that its definition of "promptness" extends to "probable cause determinations" generally. It does not purport to limit its scope to adults or even to qualify its meaning for juveniles.

I do not see in McLaughlin itself any basis to restrict its definition of "promptness" against juveniles. Quite the contrary. The reasoning of the McLaughlin court is premised on an assessment that the "undefined" promptness requirement of Gerstein is simply too "vague" a "standard." (County of Riverside v. McLaughlin, supra, 500 U.S. at p. __ [114 L.Ed.2d at p. 62, 111 S.Ct. at p. 1669].) That assessment holds as true for juvenile proceedings relating to minors as for criminal actions involving adults. Perhaps truer. For if "it is not enough to say that probable cause determinations must be 'prompt' " for criminal actions (id. at p. __ [114 L.Ed.2d at p. 62, 111 S.Ct. at p. 1669]), which are governed by a procedural law that is relatively well defined, a fortiori it is not nearly enough for juvenile proceedings, which are guided by norms of another sort. Similarly, if the "undefined" promptness requirement has already "led to a flurry of systemic challenges to city and county practices [in criminal actions], putting federal judges in the role of making legislative judgments and overseeing local jailhouse operations" (id. at p. __ [114 L.Ed.2d at p. 62, 111 S.Ct. at p. 1669]), it will surely lead to like challenges in juvenile proceedings–of which the present is, apparently, only the first–involving the state judiciary as well as the federal in

matters that belong largely to the other branches of government.

Neither do I discover any support outside McLaughlin to condition its definition of "promptness" against juveniles. As stated, juveniles as well as adults are entitled to the protections of the Fourth Amendment. As also stated, the basic criterion of the constitutional provision is "reasonableness." The definition articulated by the McLaughlin court serves to give content to this test. No reason appears to deny its benefit to juveniles. Unquestionably, "it is not enough to say that probable cause determinations must be 'prompt' " (County of Riverside v. McLaughlin, supra, 500 U.S. at p. __ [114 L.Ed.2d at p. 62, 111 S.Ct. at p. 1669]) when the state acts as enforcer of the criminal law for the sake of the community generally. The same is true when the state acts as parens patriae for the benefit of the child. The word "prompt" is no less "vague" in the latter situation than in the former. As noted, under the Fourth Amendment as construed by Gerstein and McLaughlin, a law-abiding person wrongfully arrested without a warrant is guaranteed

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his freedom within about 48 hours. It would be unreasonable to hold that when the person in question happens to be a juvenile, the guaranty is illusory.

Therefore, I conclude that McLaughlin's definition of "promptness" does in fact operate in the juvenile setting.

C

In conducting my analysis, I have not overlooked Schall v. Martin, supra, 467 U.S. 253, which was decided nine years after Gerstein and seven years before McLaughlin.

In Schall, the United States Supreme Court held that a section of the New York Family Court Act was not invalid under the due process clause of the Fourteenth Amendment. (Schall v. Martin, supra, 467 U.S. at pp. 256-257, 263-281 [81 L.Ed.2d at pp. 211-212, 217-228].) The provision in question

authorized court-ordered "preventive detention" of a juvenile accused of delinquency, i.e., pretrial detention based on a judicial finding that there is a "serious risk" that the juvenile " 'may before the return date commit an act which if committed by an adult would constitute a crime.' " (Id. at p. 255 [81 L.Ed.2d at p. 211].) The court expressly noted that the propriety of detention based on a warrantless arrest was "not at issue": the sole question concerned "judicially ordered detention." (Id. at p. 258, fn. 5 [81 L.Ed.2d at p. 213], italics added.)

In scrutinizing the New York statutory scheme, the Schall court asked whether the authorization of court-ordered preventive detention was compatible with "fundamental fairness" under the Fourteenth Amendment's due process clause. (Schall v. Martin, supra, 467 U.S. at p. 263 [81 L.Ed.2d at p. 216].) It identified two subsidiary inquiries. First, did court-ordered preventive detention under the statutory provision serve a legitimate state objective? (Id. at pp. 263-264 [81 L.Ed.2d at pp. 216-217].) Second, were the procedural safeguards contained therein adequate against erroneous and unnecessary restraints of liberty? (Id. at p. 264 [81 L.Ed.2d at p. 217].)

At the outset, the Schall court observed: "There is no doubt that the Due Process Clause is applicable in juvenile proceedings. 'The problem . . . is to ascertain the precise impact of the due process requirement upon such proceedings.' " (Schall v. Martin, supra, 467 U.S. at p. 263 [81 L.Ed.2d at p. 216].) It went on: "[C]ertain basic constitutional protections enjoyed by adults accused of crimes also apply to juveniles. [Citations.] But the Constitution does not mandate elimination of all differences in the treatment of

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juveniles. [Citation.] The State has 'a parens patriae interest in preserving and promoting the welfare of the child,' [citation], which makes a juvenile proceeding fundamentally different from an adult criminal trial." (Ibid.) In view thereof, it had "tried . . . to strike a balance—to respect the 'informality' and 'flexibility' that characterize juvenile proceedings,

[citation], and yet to ensure that such proceedings comport with the 'fundamental fairness' demanded by the Due Process Clause." (Ibid.)

The Schall court concluded that the New York statutory scheme with its authorization of court-ordered preventive detention was indeed compatible with "fundamental fairness" under the Fourteenth Amendment's due process clause. It did so because it answered each of the two subsidiary inquiries in the affirmative.

First, the Schall court held that court-ordered preventive detention under the New York statutory scheme served the legitimate state objective of protecting both society and the juvenile from the hazards of pretrial crime. (Schall v. Martin, supra, 467 U.S. at pp. 264-274 [81 L.Ed.2d at pp. 217-223].) On this point, it explained that in aiming at such protection, the state undertook to act as enforcer of the criminal law for the sake of the community generally and also as parens patriae for the benefit of the child. (Id. at pp. 264-266 [81 L.Ed.2d at pp. 217-218].)

Second, the Schall court held that the procedural safeguards contained in the New York statutory scheme were adequate against erroneous and unnecessary restraints of liberty. (Schall v. Martin, supra, 467 U.S. at pp. 274-281 [81 L.Ed.2d at pp. 223-228].) In this regard, it observed that under both the Fourth Amendment as construed by Gerstein and the Fourteenth Amendment's due process clause as interpreted in various decisions involving juvenile proceedings, there was a common concern with "flexibility" and "informality." (Id. at p. 275 [81 L.Ed.2d at p. 224].) It indicated that Gerstein had found certain "flexible procedures," which included a formal, adversarial probable cause hearing within five days of a warrantless arrest, to be adequate for the Fourth Amendment. (Id. at p. 277 & fn. 28 [81 L.Ed.2d at p. 225].) It made clear that it found similar procedures under the New York statutory scheme, which included a formal, adversarial probable cause hearing within at most nine days of a warrantless arrest, to be sufficient for the Fourteenth Amendment's due process clause.

After even brief consideration, it becomes plain that Schall does not affect the conclusion that Gerstein's promptness requirement is indeed applicable to juveniles and that McLaughlin's definition of "promptness" does in fact operate in this setting.

[6 Cal.4th 1249]

"It is axiomatic," of course, "that cases are not authority for propositions not considered." (People v. Gilbert (1969) 1 Cal.3d 475, 482, fn. 7 [82 Cal.Rptr. 724, 462 P.2d 580]; accord, McDowell & Craig v. City of Santa Fe Springs (1960) 54 Cal.2d 33, 38 [4 Cal.Rptr. 176, 351 P.2d 344].)

To begin with, Schall is based on the Fourteenth Amendment's due process clause. Gerstein and McLaughlin, by contrast, rest on the Fourth Amendment. Indeed, the Schall court effectively declared that its reach did not extend to the Fourth Amendment question presented here when it expressly noted that it was solely concerned with "judicially ordered detention." (Schall v. Martin, supra, 467 U.S. at p. 258, fn. 5 [81 L.Ed.2d at p. 213], italics added.) Moreover, the Schall court referred only to formal, adversarial probable cause hearings, and not the informal, nonadversarial judicial probable cause determinations discussed in Gerstein and McLaughlin. Lastly, and perhaps most important, the Schall court dealt with a situation in which the juvenile was already detained pursuant to court order—unlike the situation here, where he was not.

To be sure, at one point in its opinion the Schall court stated: "In Gerstein . . . , we held that a judicial determination of probable cause is a prerequisite to any extended restraint on the liberty of an adult accused of crime." (Schall v. Martin, supra, 467 U.S. at pp. 274-275 [81 L.Ed.2d at p. 224], italics added to "adult.") And at another point: "In many respects, the [New York statutory scheme] provides far more predetention protection for juveniles than we found to be constitutionally required for a probable-cause determination for adults in Gerstein." (Id. at p. 275 [81 L.Ed.2d at p. 224], italics added to "adults.")

The Schall court's dicta, isolated and irrelevant as they are, cannot reasonably be read as an after-the-fact attempt to limit Gerstein to adults, but must be viewed merely as a reflection of the general factual context out of which Gerstein arose. Indeed, it appears that no reported decision—with the singular exception of the opinion of the Court of Appeal below—has construed these words to impose such a limitation. This is certainly true of McLaughlin. In that case, the court could easily have used this language, which was cited by the parties and amici curiae therein, to limit Gerstein to adults. Conspicuously, it did not do so.

It can perhaps be argued that there is tension between Schall and McLaughlin. The former implies that a formal, adversarial probable cause hearing within at most nine days of the warrantless arrest of a juvenile who is already in court-ordered preventive detention suffices for the Fourteenth Amendment's due process clause. By contrast, the latter holds that a judicial

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probable cause determination, albeit informal and non-adversarial, is required by the Fourth Amendment generally within 48 hours of a warrantless arrest.

Any such tension, however, must necessarily be resolved in favor of the later-decided McLaughlin and against the earlier-decided Schall. By its terms, the Schall implication depends on Gerstein's "undefined" promptness requirement and Gerstein's consequent approval of a delay of five days between a warrantless arrest and a formal, adversarial probable cause hearing. The McLaughlin holding, however, expressly defines "promptness" as generally within 48 hours and thereby withdraws approval of a 5-day delay. Therefore, the Schall implication simply does not survive the McLaughlin holding.

In conducting my analysis, I have also not overlooked Reno v. Flores (1993) __ U.S. __ [123 L.Ed.2d 1, 113 S.Ct. 1439] (hereafter Flores).

In Flores, the United States Supreme Court rejected a constitutional challenge, based solely on the due process clause of the Fifth Amendment, to an Immigration and Naturalization Service regulation governing the detention of allegedly deportable alien juveniles. It cited Schall. But it did not even allude to the Fourth Amendment, less still Gerstein or McLaughlin. That, of course, is not surprising. It appears that deportable aliens are not even within the protection of the Fourth Amendment. In United States v. Verdugo-Urquidez (1990) 494 U.S. 259, 265 [108 L.Ed.2d 222, 232-233, 110 S.Ct. 1056], the court stated, albeit only in dictum, that " 'the people' protected by the Fourth Amendment . . . refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community"—among whom deportable aliens do not seem to number.

Since a case, like Schall, is not authority for a proposition it did not consider, a fortiori, a case, like Flores, cannot be authority for a proposition it could not have considered.

V

Like the Court of Appeal below, the lead opinion sets out to answer the question posed—viz., whether the superior court's "official position" that Gerstein's promptness requirement, at least as defined by McLaughlin, is not applicable to juveniles, is contrary to the Fourth Amendment as construed by those decisions—by addressing a question not posed—viz., whether the Juvenile Court Law is compatible with "fundamental fairness" under the Fourteenth Amendment's due process clause as interpreted in Schall. The

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fatal flaw of such analysis is evident: it is altogether nonresponsive. The lead opinion may just as well have attempted to determine whether the superior court's "official position" is contrary to the Fourth Amendment by considering whether the Juvenile Court Law violates the Eighth

Amendment's prohibition against cruel and unusual punishments.

Perhaps the lead opinion means to declare that whether and to what extent the Fourth Amendment is applicable to juveniles in the juvenile setting somehow implicates the due process clause of the Fourteenth Amendment. No reason or authority is presented in support of such a proposition. None is evident. The coverage of the Fourth Amendment, of course, is determined by the Fourth Amendment. True, the guaranty of due process protects those who have not attained the age of majority. But it protects as well those who have.

The lead opinion is much taken with Schall. Too much so.

The lead opinion implies that Schall is "authoritative" on the Fourth Amendment standards governing the detention of juveniles. But at most, it is such only as to court-ordered preventive detention. Detention of that sort, however, is not what is involved here. The lead opinion attempts to avoid the limited scope of Schall. But it trips on the opinion's very words: the propriety of detention based on a warrantless arrest was "not at issue"; the sole question concerned "judicially ordered detention." (Schall v. Martin, supra, 467 U.S. at p. 258, fn. 5 [81 L.Ed.2d at p. 213], italics added.)

The lead opinion also implies that Schall requires examination of "all the procedural components" of the Juvenile Court Law because Schall itself examined "all the procedural components" of the New York Family Court Act. (Lead opn., ante, at p. 1226.) That is not so. Schall's consideration of the New York statute was dictated solely by the fact that, in that case, the statute had been challenged as invalid under the due process clause of the Fourteenth Amendment. The Juvenile Court Law is not challenged here at all.

Lastly, the lead opinion assumes that the "authority" of Schall is unaffected by McLaughlin. But, as explained, in

part relevant here the earlier-decided Schall does not even survive the later-decided McLaughlin.

The lead opinion then suggests that Gerstein's promptness requirement, at least as defined by McLaughlin, is inapplicable to juveniles because in juvenile proceedings the state assertedly acts as parens patriae to preserve and promote the welfare of the child, whereas in criminal actions it acts as enforcer of the criminal law to mete out punishment.

[6 Cal.4th 1252]

Even if the lead opinion's premise is sound, its conclusion is simply incorrect. Whenever the state predicates detention on criminal activity—in whatever proceeding, under whatever role, or for whatever objective—probable cause is crucial for Fourth Amendment purposes. And whenever probable cause is crucial, Gerstein's promptness requirement, as defined by McLaughlin, is applicable. A prompt judicial probable cause determination generally within 48 hours of a juvenile's warrantless arrest—a determination that may be informal and nonadversarial—is altogether consistent with the Juvenile Court Law, the goals of which include the expeditious resolution of issues in a relatively open and cooperative setting.

I recognize that under the Juvenile Court Law, the state may detain a juvenile for reasons unrelated to criminal activity—although only in a separate nonsecure facility segregated from those suspected of crime (Welf. & Inst. Code, § 206)—as when the minor appears in public suffering from a sickness or injury that requires care (id., § 305, subd. (d)). In such a situation, Gerstein and McLaughlin are not implicated by their very terms. But such a situation does not obtain here.

In a word, when the state detains a person for criminal activity, it must establish probable cause. It is now settled that "[a] State has no legitimate interest in detaining . . . individuals who have been arrested without probable cause" generally beyond 48 hours. (County of Riverside v. McLaughlin, supra, 500 U.S. at p. [114 L.Ed.2d at p. 62

111 S.Ct. at p. 1669], italics added.) It is inconceivable that a "legitimate interest" could somehow spring into being when the individual in question turns out to be a juvenile.

The lead opinion also suggests that Gerstein's promptness requirement, at least as defined by McLaughlin, is inapplicable to juveniles because their interest in freedom from restraint of liberty under the Fourth Amendment is assertedly less substantial than that of adults. But as stated, the basic criterion of the constitutional provision is "reasonableness." Extended restraint for a criminal offense in the absence of probable cause is no more reasonable for juveniles than adults. Arguably less so. In California at least, adults generally have the right to release on bail. (See Cal. Const., art. I, § 12; Pen. Code, § 1268 et seq.) Juveniles do not. (Aubry v. Gadbois (1975) 50 Cal.App.3d 470, 471-475 [123 Cal.Rptr. 365] (per Kaus, P.J.) [rejecting claims substantially based on, among other provisions, Cal. Const., art. I, § 12, and Pen. Code, § 1268 et seq.].) "[D]etaining . . . individuals who have been arrested without probable cause" beyond 48 hours is presumptively unreasonable. (County of Riverside v. McLaughlin, supra, 500 U.S. at p. __ [114 L.Ed.2d at p. 62, 111 S.Ct. at p. 1669].) It is unexplained how the individual's status as a juvenile can change the rule.

[6 Cal.4th 1253]

Similarly, the lead opinion suggests that Gerstein's promptness requirement, at least as defined by McLaughlin, is inapplicable to juveniles because restraint of liberty under the Juvenile Court Law is assertedly more limited than restraint of liberty under the criminal law. But what matters for Gerstein and McLaughlin is the fact of restraint and not its character. Indeed, as the Gerstein court itself observed, "Even pretrial release may be accompanied by burdensome conditions that effect a significant restraint of liberty." (Gerstein v. Pugh, supra, 420 U.S. at p. 114 [43 L.Ed.2d at p. 65], italics added.)

Most prominently, I believe, the lead opinion suggests that Gerstein's promptness requirement, at least as defined by McLaughlin, is inapplicable to juveniles because the Juvenile

Court Law assertedly has more "procedural safeguards" than the criminal law. The short answer is that none of these "protections" even purports to be an equivalent for a prompt judicial probable cause determination. Indeed, the provisions cited by the lead opinion generally relate to the disposition of the detained juvenile within the juvenile system. They do not primarily concern whether the juvenile ought to have been detained within the system in the first place. That is the function of a prompt judicial probable cause determination. The cited "procedural safeguards" "protect" the juvenile who has been arrested without probable cause in much the same way as prison health and safety regulations "protect" an inmate who has been wrongfully convicted. They are too little, too late. In brief, they simply do not guarantee that a law-abiding juvenile wrongfully arrested without a warrant will regain his freedom within about 48 hours.

I acknowledge that in certain instances the probation officer appears obligated to investigate the question of probable cause. But, by definition, the prompt judicial probable cause determination mandated by the Fourth Amendment as construed by Gerstein and McLaughlin must be made by a judicial officer. Obviously, the probation officer is not such. He has responsibility to law enforcement, seeing that he is possessed of the "powers and authority conferred by law upon peace officers . . . ." (Welf. & Inst. Code, § 283.) The United States Supreme Court expressly recognized as much in Fare v. Michael C. (1979) 442 U.S. 707 [61 L.Ed.2d 197, 99 S.Ct. 2560], which dealt with the status of the probation officer under the Juvenile Court Law. "[T]he probation officer is the employee of the State which seeks to prosecute the alleged offender. He is a peace officer, and as such is allied, to a greater or lesser extent, with his fellow peace officers. He owes an obligation to the State, notwithstanding the obligation he may also owe the juvenile under his supervision. In most cases, the probation officer is duty bound to report wrongdoing by the juvenile when it comes to his attention, even if by communication from the juvenile himself." (Id. at p. 720 [61 L.Ed.2d at p. 209]; accord, In re Michael C. (1978) 21 Cal.3d 471, 478-479

[146 Cal.Rptr. 358, 579 P.2d 7] (conc. opn. of Mosk, J.), revd. on other grounds sub nom. Fare v. Michael C., supra, 442 U.S. 707.) The probation officer's "responsibility to law enforcement is inconsistent with the constitutional role of a neutral and detached magistrate." (Gerstein v. Pugh, supra, 420 U.S. at p. 117 [43 L.Ed.2d at p. 67].)

What the lead opinion may mean to suggest in alluding to the "procedural safeguards" of the Juvenile Court Law is that, in Gerstein's words, "existing procedures . . . satisfy the requirement of the Fourth Amendment." (Gerstein v. Pugh, supra, 420 U.S. at p. 124 [43 L.Ed.2d at p. 71].) If it does, it is wrong. As stated, the cited "protections" simply do not guarantee that a law-abiding juvenile wrongfully arrested without a warrant will regain his freedom within about 48 hours.

The lead opinion next suggests that Gerstein's promptness requirement, at least as defined by McLaughlin, is inapplicable to juveniles because it is assertedly incompatible with the " 'informality' and 'flexibility' that characterize juvenile proceedings . . . ." (Schall v. Martin, supra, 467 U.S. at p. 263 [81 L.Ed.2d at p. 216].) No such incompatibility, however, is apparent.

Plainly, the "informality" and "flexibility" of juvenile proceedings—both in American jurisdictions generally and in California specifically—are designed to make the process more expeditious than that of criminal actions, not less. The review by the lead opinion proves the point as to the Juvenile Court Law. Thus, if any colorable attack could be mounted against McLaughlin's definition of "promptness," it would be that it is too long, not too short.

Further, it is evident that a prompt judicial probable cause determination generally within 48 hours of a juvenile's warrantless arrest—like similar determinations routinely and quickly made on application for an arrest warrant—can readily be accommodated. I note that in a case such as this, the arresting officer must presently prepare a "concise written

statement of . . . probable cause" "without necessary delay"-and specifically within 24 hours if the criminal offense in question is a misdemeanor. (Welf. & Inst. Code, § 626, subd. (d).) I also note, in words from Gerstein, that "[b]ecause the standards [for arrest and detention] are identical, ordinarily there is no need for further investigation before the [judicial] probable cause determination can be made." (Gerstein v. Pugh, supra, 420 U.S. at p. 120, fn. 21 [43 L.Ed.2d at p. 69].) Evidently, a longer "period of detention" is not required for the state "to take the administrative steps incident to arrest" for a juvenile than for an adult. (Id. at p. 114.) Indeed, at oral argument on rehearing, counsel for respondent effectively conceded the point: a judicial probable cause determination, he admitted, is "not . . . difficult" to make.

[6 Cal.4th 1255]

It may be true, as the lead opinion asserts, that "when a minor is detained on suspicion of criminal activity, in contrast to an adult detained under similar circumstances, the inquiry into the propriety of the extended detention is much broader in scope"—and more "complex"—"than a determination, in the strict Fourth Amendment sense, of whether 'factual' probable cause exists to believe the minor committed the crime for which he was taken into custody." (Lead opn., ante, at pp. 1221-1222.) That this "inquiry" may be "broader" and more "complex" than probable cause is a result of the Legislature's policy choice and not federal constitutional compulsion. But this "inquiry" does indeed depend on probable cause narrowly and simply defined.

It may also be true, as the lead opinion asserts, that the so-called "factual probable cause determination is but one component of the broader inquiry . . . ." (Lead opn., ante, at p. 1224, italics omitted.) But this "component" is the first to be decided both in time and in logic.

To repeat: "A state has no legitimate interest in detaining . . . individuals who have been arrested without probable cause" generally beyond 48 hours (County of Riverside v. McLaughlin, supra, 500 U.S. at p. __ [114 L.Ed.2d at p. 62, 111 S.Ct. at p. 1669], italics added)—whether or not

such individuals have attained the age of majority. Surely, the state may have a "legitimate interest" in continuing to detain juveniles who have been arrested without probable cause beyond 48 hours when there exists a supported basis for doing so separate and independent from the unsupported suspicion of criminal activity, as for example the presence of sickness or injury that requires care (see Welf. & Inst. Code, § 305, subd. (d)). In such cases, the state may continue to detain without implicating Gerstein and McLaughlin.

The foregoing assessment of the feasibility of a prompt judicial probable cause determination generally within 48 hours of a juvenile's warrantless arrest is confirmed by experience. Petitioner represents, without dispute, that a number of the state's largest counties, including San Diego, Orange, Santa Clara, Sacramento, San Francisco, Fresno, and San Mateo, are successfully providing determinations of this kind. At oral argument on rehearing, counsel for respondent conceded that Los Angeles is doing the same, at least for most juveniles.

The lead opinion then suggests, most curiously, that Gerstein's promptness requirement, at least as defined by McLaughlin, is inapplicable to juveniles because the commands laid down by the United States Constitution should yield to the preferences indicated in California law.

Of course, under the supremacy clause, the reverse is true.

[6 Cal.4th 1256]

Thus, the state may choose under the Juvenile Court Law to fully investigate the circumstances of a detained juvenile, his parents, and his home before it decides whether and how to release him. (See Welf. & Inst. Code, § 628.) But it cannot extend the juvenile's detention as it pursues its investigation without a prompt judicial probable cause determination generally within 48 hours of his warrantless arrest–which establishes whether the juvenile should have been detained in the first place. To permit the state to grant itself such an extension would allow it to avoid the

promptness requirement entirely--surely an untenable result. To repeat yet again: "A State has no legitimate interest in detaining . . . individuals who have been arrested without probable cause" generally beyond 48 hours (County of Riverside v. McLaughlin, supra, 500 U.S. at p. __ [114 L.Ed.2d at p. 62, 111 S.Ct. at p. 1669], italics added)--whether or not such individuals have attained the age of majority.

In any case, the state's furtherance of the choices it has decided to pursue under the Juvenile Court Law is not adversely affected by the Fourth Amendment's mandate of a prompt judicial probable cause determination generally within 48 hours of a juvenile's warrantless arrest.

The experience in Orange County appears typical. In a letter in support of the petition for review, the Orange County Public Defender represented that "[i]n response to [McLaughlin], law enforcement agencies . . . prepare and submit single page pre-printed forms which, when completed, summarize the basis of a warrantless arrest"; the "arresting agency . . . submits a 'probable cause' sheet to Juvenile Hall intake officers when booking a minor"; twice a day when court is in session and once a day when it is not, a judicial officer reviews the " 'probable cause' sheets," either directly or over the telephone, and "makes the necessary determination"; "[t]hroughout the foregoing procedures, the minor's normal Juvenile Hall routine is never interrupted or delayed and no changes have been made in this routine as a result of the above McLaughlin procedure"; "[a]t no time is the minor transported to a courtroom or holding area in conjunction with a 'probable cause' determination"; "[a]t no time is the district attorney or public defender's office consulted as to any probable cause determination"; the "determination is non-adversarial and there are no court appearances by the minor, counsel or any law enforcement personnel."

The lead opinion also implies that "promptness" for purposes of the prompt judicial probable cause determination mandated by the Fourth Amendment as construed by Gerstein and McLaughlin may be measured in terms of the

time that is required for any given state to "take" whatever "steps" it chooses beyond those "incident to arrest" (Gerstein v. Pugh, supra,

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420 U.S. at p. 114 [43 L.Ed.2d at p. 65]). That cannot be. As stated, a federal constitutional mandate that is designed to constrain the states cannot be dependent on such individual policy choices. Otherwise, that mandate would be rendered empty: each individual state would effectively be allowed to define "promptness" for itself.

One thing remains to be said. And it is important. The lead opinion's reasoning does not express the views of a majority of this court. As a result, its analysis "lacks authority as precedent" (Board of Supervisors v. Local Agency Formation Com. (1992) 3 Cal.4th 903, 918 [13 Cal.Rptr.2d 245, 838 P.2d 1198]) and hence cannot bind. Therefore, its mischief is limited to this case and to this case alone.

VI

For the reasons stated, I conclude that Gerstein's promptness requirement is indeed applicable to juveniles and that McLaughlin's definition of "promptness" does in fact operate in this setting.

From this conclusion, it follows that petitioner's systemic Fourth Amendment challenge to the superior court's "official position" that Gerstein's promptness requirement, at least as defined by McLaughlin, is not applicable to juveniles is successful.

I would therefore reverse the judgment of the Court of Appeal with directions to cause issuance of a peremptory writ of mandate compelling the superior court to comply with Gerstein's promptness requirement as defined by McLaughlin with regard to juveniles as well as adults.

In closing, I quote, with minor modifications, Justice Scalia's final words in his dissenting opinion in McLaughlin.

"Justice Story wrote that the Fourth Amendment 'is little more than the affirmance of a great constitutional doctrine of the common law.' [Citation.] It should not become less than that. One hears the complaint, nowadays, that the Fourth Amendment has become constitutional law for the guilty; that it benefits the career criminal (through the exclusionary rule) often and directly, but the ordinary citizen remotely if at all. By failing to protect the innocent [juvenile] arrestee, today's [decision] reinforces that view. . . . Hereafter a law-abiding [juvenile] wrongfully arrested may be compelled to await the grace of a Dickensian bureaucratic machine, as it churns its cycle for up to [three] days—never once given the opportunity to show a judge that there is absolutely no reason to hold him, that a mistake has been made.

[6 Cal.4th 1258]

In my view, this is the image of a system of justice that has lost its ancient sense of priority, a system that few Americans would recognize as our own." (County of Riverside v. McLaughlin, supra, 500 U.S. at p. __ [114 L.Ed.2d at p. 72, 111 S.Ct. at p. 1677] (dis. opn. of Scalia, J.).)

Accordingly, I dissent.

Kennard, J., and George, J., concurred.

GEORGE, J.—I respectfully dissent.

I previously have expressed my view that generally worded constitutional and statutory provisions typically do not lend themselves to application through fixed, mechanical rules established by judicial decree. [1/] The United States Supreme Court has spoken in the present context, however, holding in County of Riverside v. McLaughlin (1991) 500 U.S.

[1/] With reference to the statutory mandate that an adult suspect be taken before a magistrate for arraignment without unnecessary delay and within two days of arrest, see Youngblood v. Gates (1988) 200 Cal.App.3d 1302, 1343-1350 [246 Cal.Rptr. 775] (dis. opn. of George, J.).

44, __ [114 L.Ed.2d 49, 63-64, 111 S.Ct. 1661, 1670], that a state's criminal statutory scheme does not comply with the Fourth Amendment unless it provides that a "person" (without differentiation between adults and juveniles), arrested and detained without a warrant, will be afforded a judicial determination of probable cause within 48 hours of arrest. That federal constitutional rule is now settled and, of course, binding upon this court.

Although, as the lead opinion recognizes, the procedures constitutionally mandated in juvenile proceedings need not mirror in all respects the procedures required in adult criminal proceedings, I agree with Justice Mosk's conclusion that the People have not identified any state interest that would justify incarcerating a juvenile, detained solely because law enforcement authorities believe he or she has committed a crime, for a period of time (before according the juvenile an impartial judicial determination of probable cause) longer than the time the state could detain an adult under similar circumstances. Indeed, in this context, I believe the need for a very prompt judicial determination of probable cause may be a more crucial factor in assessing the "reasonableness" of the "seizure" of a juvenile than of an adult, because the consequences of even a relatively brief, wrongful incarceration are likely to be more detrimental and long-lasting to an innocent, vulnerable child than to an innocent adult. (See, e.g., In re William M. (1970) 3 Cal.3d 16, 31, fn. 25 [89 Cal.Rptr. 33, 473 P.2d 737].) In my view, the lead opinion's conclusion to the contrary is not supported either by Schall v. Martin (1984) 467 U.S. 253 [81 L.Ed.2d 207, 104 S.Ct. 2403], or the very

[6 Cal.4th 1259]

recent decision in Reno v. Flores (1993) 507 U.S. __ [123 L.Ed.2d 1, 113 S.Ct. 1439]], because neither case purported to address the propriety of an extended detention of a juvenile who could be released to the custody of his or her family but has been detained solely because he or she is suspected of committing a crime.

[7 Cal.4th 477d]

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ALFREDO A., Petitioner,

v.

The SUPERIOR COURT of Los Angeles County,
Respondent;

The PEOPLE,
Real Party in Interest.

No. S024618.
Supreme Court of California,
In Bank.

March 18, 1994.

[Modification of opinion (6 Cal.4th 1212; 26 Cal.Rptr.2d 623, 865 P.2d 56).]

THE COURT:

The opinion herein, filed on January 24, 1994 (6 Cal.4th. 1212, plur.opn. by Lucas, C.J., conc. & dis. opn. by Arabian, J., dis. opns. by Mosk, J. & George, J.) is modified as follows:

At the end of line 4 of page 22 [6 Cal.4th 1226, advance report, line 14] of the typed plurality opinion, new footnote 3 is added as follows, and subsequent footnotes are renumbered accordingly:

At the "initial appearance" the juvenile was entitled to challenge the sufficiency of the delinquency petition, thus raising the issue of probable cause. (Schall, supra, at pp. 275-276 [81 L.Ed.2d at pp. 224-225].) This fact, however, does not appear essential to Schall's analysis. The Schall majority emphasized that postponement of a probable-cause

determination until the formal, adversarial probable-cause hearing did not offend due process. Moreover, as noted, the Schall majority expressed no concern that the "initial appearance" could itself be postponed for up to 72 hours after the juvenile's arrest.

This modification does not affect the judgment.

[Since, due to rehearing, this opinion no longer appears in the Official Reports, the internal citations will be to the California Reporter]

[18 Cal.Rptr.2d 869]

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ALFREDO A., Petitioner,

v.

The SUPERIOR COURT of Los Angeles County,
Respondent;

The PEOPLE,
Real Party in Interest.

No. S024618.
Supreme Court of California,
In Bank.

May 4, 1993
Rehearing Granted July 15, 1993.

OPINION

[18 Cal.Rptr. 870]

LUCAS, Chief Justice.

In Gerstein v. Pugh (1975) 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (hereafter Gerstein), the United States Supreme Court held that the Fourth Amendment requires a prompt judicial determination of "probable cause to believe the suspect has committed a crime" as a prerequisite to an extended pretrial detention following a warrantless arrest. (Id., at pp. 114, 120, 95 S.Ct. at pp. 863, 866.) The court stopped short of mandating a specific timetable for making a "prompt" determination of probable cause.

In County of Riverside v. McLaughlin (1991) -- U.S. ---, ---, 111 S.Ct. 1661, __, 114 L.Ed.2d 49 (hereafter McLaughlin), the high court sought to further define the "promptness" requirement for making the probable cause determination mandated in Gerstein. The court held that, "Taking into account the competing interests articulated in Gerstein, we believe that a jurisdiction that provides judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement of Gerstein." (McLaughlin, supra, __ U.S. at p. __, 111 S.Ct. at p. 1670.)

Neither Gerstein nor McLaughlin was a juvenile detention case. We granted review in this case to determine whether the 48-hour rule of McLaughlin applies to juveniles and adults alike who are arrested without a warrant on suspicion of criminal activity.

Schall v. Martin (1984) 467 U.S. 253, 104 S.Ct. 2403, 81 L.Ed.2d 207 (hereafter Schall), unlike Gerstein and McLaughlin, was a juvenile detention case. Schall was decided well after Gerstein but prior to McLaughlin. Schall, and other decisions of the high court, make it abundantly clear that Fourth Amendment claims pertaining to juvenile detentions following warrantless arrests for criminal activity cannot be viewed in isolation. This is so because, in the words of the high court, juvenile proceedings are "fundamentally different" from adult criminal proceedings, requiring that a "balance" be struck between the "informality" and "flexibility" that necessarily characterize juvenile proceedings, and the requirement that those proceedings comport with the juvenile's constitutional rights and the " 'fundamental fairness demanded by the Due Process Clause.' " (Schall, supra, 467 U.S. at p. 263, 104 S.Ct. at p. 2409.)

[18 Cal.Rptr. 871]

In light of the comprehensive analysis which the court invoked in Schall, supra, 467 U.S. 253, 104 S.Ct. 2403, to scrutinize the constitutionality of the juvenile detention provision there at issue, we do not believe the court subsequently envisioned that the 48-hour rule announced in

McLaughlin, supra, __ U.S. __, 111 S.Ct. 1661--a Fourth Amendment ruling handed down in an adult detention case--would automatically apply in the juvenile detention setting. To conclude otherwise, we would have to ignore the fundamental differences between adult and juvenile proceedings recognized in all of the high court's cases that have specifically addressed juvenile detention issues.

California's statutory scheme basically affords juvenile detainees who have been arrested without a warrant a formal, adversarial "detention hearing" within 72 hours of a warrantless arrest, and prescribes various other procedures designed to ensure that the juvenile will be released, in accordance with well-established and codified presumptions, at the earliest possible time following arrest, and preferably to the custody of a parent or legal guardian. Given the fundamental differences in purpose and procedure between the treatment of adults and juveniles detained following a warrantless arrest for criminal activity, we have concluded, with one exception noted below, that our statutory scheme passes constitutional muster under the Fourth and Fourteenth Amendment principles discussed in Schall, supra, 467 U.S. 253, 104 S.Ct. 2403.

As will be explained, however, one provision of the statutory scheme allows for an open-ended extension of the detention period--i.e., the period from the time of arrest to the "detention hearing," assuming the juvenile is not released prior to that hearing--for intervening "nonjudicial days," e.g., weekends and holidays. (See Welf. & Inst.Code, §§ 631, 632.) [1/] We have concluded, consistent with the principles set forth in Schall, supra, 467 U.S. 253, 104 S.Ct. 2403, and McLaughlin, supra, __ U.S. __, 111 S.Ct. 1661, that this provision cannot withstand constitutional scrutiny; it is inconsistent with the "balance" otherwise struck in our statutes between the juvenile arrestee's right under the Fourth and Fourteenth Amendments to a prompt postarrest detention determination,

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1/ All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

and the further necessity to allow for a measure of "informality" and "flexibility" in the making of that determination.

I. FACTS AND PROCEDURAL HISTORY

On July 24, 1991, petitioner Alfredo A., a minor, was taken into custody without a warrant pursuant to sections 602 and 625 [2/] on suspicion of having possessed cocaine base for sale on that date. (Health & Saf.Code, § 11351.5.)

On July 25, 1991, petitioner sought his immediate release by filing a petition for a writ of habeas corpus in the Court of Appeal for the Second Appellate District. It was alleged therein that petitioner was a juvenile who had been arrested without a warrant the previous day for commission of a criminal offense, and that: "Pursuant to the Fourth Amendment to the United States Constitution, petitioner is entitled to a judicial determination of probable cause for his continued detention within 48 hours of his arrest. No such judicial determination has been made, and no determination will be made within the 48-hour period. This is because the Los Angeles County Superior Court, Juvenile Court, has adopted as its 'official position' that a juve-

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[2/] Section 602 provides, in pertinent part: "Any person who is under the age of 18 years when he violates any law of this state . . . is within the jurisdiction of the juvenile court, which may adjudge such person to be a ward of the court."

Section 625 provides, in relevant part: "A peace officer may, without a warrant, take into temporary custody a minor: [¶] (a) Who is under the age of 18 years when such officer has reasonable cause for believing that such minor is a person described in Section . . . 602. . . ."

nile is not entitled to such a prompt probable cause determination." [3/]

By an order to show cause filed the following day, the Court of Appeal determined to treat the petition for a writ of habeas corpus as a petition for a writ of mandate, and directed respondent Los Angeles County Superior Court to show cause why a peremptory writ of mandate should not issue ordering that judicial probable cause determinations for the extended postarrest detention of juveniles must be made within 48-hours of their arrest.

On that same day, July 26, 1991, a wardship petition was filed in the juvenile court alleging petitioner came within the provisions of section 602 by having violated Health and Safety Code sections 11351 and 11351.5 on July 24, 1991. However, when petitioner appeared in court on the next "judicial day" (July 29, 1991), no detention report was provided to the juvenile court in preparation for the detention hearing, and petitioner's immediate release was therefore ordered. He waived time for arraignment, which was calendared for August 19, 1991.

[3/] Petitioner based his challenge to his postarrest detention on the holding in McLaughlin, supra, __ U.S. __, 111 S.Ct. 1661.

Several weeks prior to petitioner's arrest, the presiding judge of the Los Angeles County Juvenile Court sent a memorandum to all juvenile court judges, commissioners, and referees, indicating that county counsel had furnished the juvenile court with an opinion concluding McLaughlin's 48-hour rule did not apply in juvenile court proceedings. County counsel based that determination on the reasoning of Schall, supra, 467 U.S. 253, 104 S.Ct. 2403, in which a New York juvenile "preventive detention" statute was found facially valid under the due process clause of the Fourteenth Amendment. The presiding judge and supervising judges thereafter unanimously agreed to adopt county counsel's position as the Los Angeles County Juvenile Court's "official position."

In the mandamus proceeding, petitioner acknowledged that his release after spending five days in custody rendered the petition moot as to him. The Court of Appeal nonetheless determined to hear and decide petitioner's systemic Fourth Amendment challenge to the juvenile court's "official position," concluding that similar claims had proved "capable of repetition, yet evading review" because "review usually takes longer than the [challenged] temporary detention . . . ." (See Schall, supra, 467 U.S. at p. 256, fn. 3, 104 S.Ct. at p. 2405, fn. 3; Gerstein, supra, 420 U.S. at pp. 110-111, fn. 11, 95 S.Ct. at pp. 861-862, fn. 11.)

In its opinion, the Court of Appeal reviewed the relevant provisions of the Welfare and Institutions Code governing pretrial detention of juvenile arrestees. After determining that the juvenile detention issue in this case must be evaluated in light of the constitutional analysis conducted in Schall, supra, 467 U.S. 253, 104 S.Ct. 2403, the court concluded California's statutory juvenile detention scheme withstands constitutional scrutiny, reasoning: "[The] statutes provide procedural safeguards that accommodate the individual's right to liberty and the state's duty to control crime. They reflect the balance that must be struck between the informality and flexibility of juvenile proceedings even as they comport with the fundamental fairness required by due process. The statutory scheme protects a minor's right to freedom, consistent with the state interest in protecting the minor and society." Implicit in these conclusions was the court's rejection of petitioner's claim that McLaughlin's 48-hour rule applies to juvenile as well as adult postarrest detention proceedings.

II. DISCUSSION

A. Mootness of Petitioner's Claim

As noted, petitioner acknowledges that his release after spending five days in pretrial custody has technically rendered this proceeding moot as to him. The Court of Appeal nevertheless determined to hear and decide the claim. We agree that the issue, as presented in this case, is ripe for

resolution. The high court reached a similar conclusion in Schall and Gerstein:

"Although the pretrial detention of the class representatives has long since ended . . . this case is not moot for the same reason that the class action in Gerstein v. Pugh, 420 U.S. 103, 110, n. 11 [95 S.Ct. 854, 861, n. 11, 43 L.Ed.2d 54] (1975), was not mooted by the termination of the claims of

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the named plaintiffs. 'Pretrial detention is by nature temporary, and it is most unlikely that any given individual could have his constitutional claim decided on appeal before he is either released or convicted. The individual could nonetheless suffer repeated deprivations, and it is certain that other persons similarly situated will be detained under the allegedly unconstitutional procedures. The claim, in short, is one that is distinctly "capable of repetition, yet evading review." ' " (Schall, supra, 467 U.S. at p. 256, fn. 3, 104 S.Ct. at p. 2405, fn. 3.)

B. Relevant Statutory Provisions

Before discussing the controlling constitutional principles and case law, we briefly review the relevant statutory provisions that govern juvenile detentions in California.

Under our juvenile criminal justice system, a peace officer can take a minor into temporary custody for violating a federal or state law, or a local ordinance. (§§ 602, 625, subd. (a); see, ante, at p. 871, fn. 2 of 18 Cal.Rptr.2d, p. 1332, fn. 2 of 849 P.2d.) When a minor is arrested and detained on suspicion of having committed a crime, the minor is not formally "charged" with the crime in the sense that adult arrestees are criminally prosecuted. Rather, a determination is made whether to commence wardship proceedings with the filing of a petition by the prosecuting attorney pursuant to section 602. (§ 650, subd. (c).)

Various official functions must be performed at the time of the juvenile's arrest, and within the initial 24- to 48-hour period following the arrest--all designed to ensure that the detained minor is afforded every reasonable opportunity for his or her immediate release, preferably to a parent or guardian.

Hence, the arresting officer may release the minor outright (§ 626, subd. (a)), deliver him or her to a public or private shelter facility under contract with the city or county to provide shelter care, counseling, or diversion services to such minors (id., subd. (b)), or release the minor on his or her written promise to appear before a county juvenile probation officer, or to a parent, guardian, or other responsible relative, who may also be required to execute a written promise to appear along with the minor (id., subd. (c)). If the arresting officer elects instead to deliver custody of the minor directly to the county probation officer, the officer must prepare a concise, written statement of the probable cause for taking the minor into temporary custody, to be furnished along with custody of the minor to the juvenile probation officer within 24 hours of the initial detention following the arrest. (Id., subd. (d).)

The policy underlying this choice of dispositions provided for in section 626 is expressly set forth in the statute: "In determining which disposition of the minor to make, the officer shall prefer the alternative which least restricts the minor's freedom of movement, provided that alternative is compatible with the best interests of the minor and the community." (§ 626, italics added.)

When custody of the minor is transferred to a probation officer at a juvenile hall or any other place of confinement, the detaining officer is further required to "take immediate steps to notify the minor's parent, guardian, or responsible relative that such minor is in custody and the place where he is being held." (§ 627, subd. (a).)

Section 628 requires the juvenile probation officer to "immediately investigate the circumstances of the minor and

the facts surrounding his being taken into custody," and further requires the officer to "immediately release the minor to the custody of his parent, guardian, or responsible relative unless one or more . . . [specified] conditions exist. . . ." (See post, at p. 874 of 18 Cal.Rptr.2d, p. 1335 of 849 P.2d.)

Like the arresting officer, the county juvenile probation officer is empowered with discretion at the intake-investigatory stage to "adjust the situation which brings the minor within the jurisdiction [or probable jurisdiction] of the court" by "delineat[ing] specific programs of supervision for the minor," or referring the case to

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another agency, arranging for informal supervision, or requesting the district attorney to prepare a wardship petition for filing. (§ 654.)

A minor taken into custody must be released within 48 hours, excluding "nonjudicial days," unless a wardship petition is filed within that initial 48-hour period. (§ 631, subd. (a).) If a section 602 petition is filed, the minor must be afforded a formal, adversarial "detention hearing" in juvenile court "as soon as possible but in any event [no later than] the expiration of the next judicial day after a petition to declare the minor a ward . . . has been filed"--i.e., 48 to 72 hours after arrest (excluding the exception for "nonjudicial days"). (§ 632, subd. (a).)

If the offense for which the minor is taken into custody is "a misdemeanor that does not involve violence, the threat of violence, or possession or use of a weapon, and if the minor is not currently on probation or parole"--then the minor must be released within 48 hours after having been taken into custody (again, excluding "nonjudicial days") unless a wardship petition is filed and "the minor has been ordered detained by a judge or referee of the juvenile court pursuant to Section 635" within that initial 48-hour period. (§ 631, subd. (b).)

Most significantly, when a minor is detained on suspicion of criminal activity, in contrast to an adult detained

under similar circumstances, the inquiry into the propriety of the extended detention is much broader in scope than a determination, in the strict Fourth Amendment sense, of whether "factual" probable cause exists to believe the minor committed the crime for which he was arrested. Section 628 lists seven "conditions," one or more of which must be found to exist in order to warrant detaining the minor and scheduling a detention hearing within seventy-two hours of his or her arrest (again, excluding "nonjudicial" days). These conditions include whether:

"(1) The minor is in need of proper and effective parental care or control and has no parent, guardian, or responsible relative; or has no parent, guardian, or responsible relative willing to exercise or capable of exercising such care or control; or has no parent, guardian, or responsible relative actually exercising such care or control.

"(2) The minor is destitute or is not provided with the necessities of life or is not provided with a home or suitable place of abode.

"(3) The minor is provided with a home which is an unfit place for him by reason of neglect, cruelty, depravity or physical abuse of either his parents, or of his guardian or other person in whose custody or care he is.

"(4) Continued detention of the minor is a matter of immediate and urgent necessity for the protection of the minor or reasonably necessary for the protection of the person or property of another.

"(5) The minor is likely to flee the jurisdiction of the court.

"(6) The minor has violated an order of the juvenile court.

"(7) The minor is physically dangerous to the public because of a mental or physical deficiency, disorder or abnormality." (§ 628, subd. (a).)

Section 635 sets forth the factors to be considered by the juvenile court at the detention hearing, and the standard the court must apply, in evaluating the probation officer's findings pursuant to section 628 and determining whether to

continue the minor's detention or order his or her release from custody. The section provides:

"The court will examine such minor, his parent, guardian, or other person having relevant knowledge, hear such relevant evidence as the minor, his parent or guardian or their counsel desires to present, and, unless it appears that such minor has violated an order of the juvenile court or has escaped from the commitment of the juvenile court or that it is a matter of immediate and urgent necessity for the protection of such minor or reasonably necessary for the protection of the person or property of another that he be detained or that such minor is likely to flee to avoid the jurisdiction of the court, the court shall make its order releasing such minor from custody.

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[¶] The circumstances and gravity of the alleged offense may be considered, in conjunction with other factors, to determine whether it is a matter of immediate and urgent necessity for the protection of the minor or reasonably necessary for the protection of the person or property of another that the minor be detained." (§ 635.)

The minor and his parent or guardian have the right to be represented by counsel at every stage of the detention proceedings. (§ 633.) If the minor or the parent or guardian are indigent or cannot otherwise afford an attorney, counsel will be appointed by the court. (§ 634.) In any case in which it appears to the court that there is a conflict of interest between a parent or guardian and the minor, separate counsel may be appointed for the minor and the parent or guardian. (Ibid.)

As is evident from the foregoing summary of the relevant statutes, the determination whether to detain a minor following a warrantless arrest for criminal activity is a complex one, requiring consideration of various factors personal to the minor and his family situation (§ 628), and the application of several important statutory presumptions favoring the minor's early release to a parent, guardian or responsible relative (§§ 626, 628, 631, subd. (a)), or, if extended detention is

warranted, selection of the detention alternative most "compatible with the best interests of the minor . . . ," and "which least restricts the minor's freedom of movement" (§ 626). These presumptions, and the policies they implement, are not implicated in the judicial determination of probable cause to detain an adult following a warrantless arrest.

Bearing these distinctions in mind, we turn next to the opinions in Gerstein, supra, 420 U.S. 103, 95 S.Ct. 854, Schall, supra, 467 U.S. 253, 104 S.Ct. 2403, McLaughlin, supra, __ U.S. __, 111 S.Ct. 1661, and most recently, Reno v. Flores (1993) __ U.S. __, 113 S.Ct. 1439, 123 L.Ed.2d 1 (hereafter Flores), to see if those decisions will support an inference that the Supreme Court intended the 48-hour rule to apply in juvenile proceedings.

C. Applicability of McLaughlin's 48-Hour Rule to Juvenile Detention Proceedings

In Gerstein, supra, 420 U.S. 103, 95 S.Ct. 854, the Supreme Court held unconstitutional Florida procedures under which persons arrested without a warrant could be kept in police custody for 30 days or more without a probable cause determination. The court held that the Fourth Amendment requires a prompt judicial determination of "probable cause to believe the suspect has committed a crime" as a prerequisite to an extended pretrial detention following a warrantless arrest. (Id., at pp. 114, 120, 95 S.Ct. at pp. 863, 866.)

In McLaughlin, supra, __ U.S. __, 111 S.Ct. 1661, the court reiterated some of the competing policy concerns underlying its earlier holding in Gerstein:

"In reaching this conclusion we attempted to reconcile important competing interests. On the one hand, States have a strong interest in protecting public safety by taking into custody those persons who are reasonably suspected of having engaged in criminal activity, even where there has been no prior opportunity for a prior judicial determination of

probable cause. 420 U.S., at 112 [95 S.Ct. at 862]. On the other hand, prolonged detention based on incorrect or unfounded suspicion may unjustly 'imperil [a] suspect's job, interrupt his source of income, and impair his family relationships.' Id., at 114, [95 S.Ct. at 863]. We sought to balance these competing concerns by holding that States 'must provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty, and this determination must be made by a judicial officer either before or promptly after arrest.' Id., at 125 [95 S.Ct. at 868-869] (emphasis added).

"[We] thus established a 'practical compromise' between the rights of individuals and the realities of law enforcement. Id., at 113 [95 S.Ct. at 862]. Under Gerstein, warrantless arrests are permitted but persons arrested without a warrant must promptly be brought before a neutral magistrate for a judicial determination of prob-

[18 Cal.Rptr. 876]

able cause. Id., at 114 [95 S.Ct. at 863]. Significantly, the Court stopped short of holding that jurisdictions were constitutionally compelled to provide a probable cause hearing immediately upon taking a suspect into custody and completing booking procedures. We acknowledged the burden that proliferation of pretrial proceedings places on the criminal justice system and recognized that the interests of everyone involved, including those persons who are arrested, might be disserved by introducing further procedural complexity into an already intricate system. Id., at 119-123 [95 S.Ct. at 865-868]. Accordingly, we left it to the individual States to integrate prompt probable cause determinations into their differing systems of pretrial procedures. Id., at 123-124 [95 S.Ct. at 867-868]." (McLaughlin, supra, __ U.S. at p. __, 111 S.Ct. at p. 1668.)

In Gerstein, the court explained that the Fourth Amendment does not require that the arrestee be afforded the "full panoply of adversary safeguards--counsel, confrontation, cross-examination, and compulsory process for witnesses" in connection with a judicial determination of probable cause. (Gerstein, supra, 420 U.S. at p. 119 [95 S.Ct. at p. 866].) The

court delineated the scope of that determination as follows: "The sole issue is whether there is probable cause for detaining the arrested person pending further proceedings .... The standard is the same as that for arrest. That standard--probable cause to believe the suspect has committed a crime--traditionally has been decided by a magistrate in a nonadversary proceeding on hearsay and written testimony ...." (Id., at p. 120, 95 S.Ct. at p. 866, fn. omitted.)

In contrast, the constitutional parameters of juvenile detentions were directly at issue in Schall, supra, 467 U.S. 253, 104 S.Ct. 2403, a case decided nine years after Gerstein, supra, 420 U.S. 103, 95 S.Ct. 854. In Schall, the court found the juvenile "preventive detention" provisions of the New York Family Court Act facially valid under the due process clause of the Fourteenth Amendment. The New York statute authorized the detention of a juvenile arrested for the commission of a crime when there is a "serious risk" the juvenile "may before the return date commit an act which if committed by an adult would constitute a crime." (Schall, supra, 467 U.S. at p. 255, 104 S.Ct. at p. 2405, fn. omitted.)

Whereas the sole issue in Gerstein was whether there was factual probable cause to detain the adult arrestee pending further proceedings--i.e., the same standard as that for arrest: "probable cause to believe the suspect has committed a crime" (Gerstein, supra, 420 U.S. at p. 120, 95 S.Ct. at p. 866)--Schall makes it abundantly clear that, where juvenile detentions are concerned, such a factual probable cause determination is but one component of the broader inquiry implicated in the determination whether to detain a juvenile arrestee.

In Schall, three juveniles were detained for more than six days before being afforded a "probable cause" hearing--the functional equivalent of a "detention hearing"--pursuant to the provisions of the New York Family Court Act. (Schall, supra, 467 U.S. at pp. 257-260, 104 S.Ct. at pp. 2406-2408.) The juveniles were brought before the family court for an "initial appearance" within one day following their arrests.

(Ibid.) Under New York law, at the "initial appearance" the family court judge makes a preliminary determination as to the jurisdiction of the court, appoints counsel, and advises the minor of his or her rights. (Id., at pp. 257-258, fn. 5, 104 S.Ct. at pp. 2406-2407, fn. 5.) If the family court is not in session, the "initial appearance" must be conducted "within 72 hours or the next day the court is in session, whichever is sooner." (Schall, supra, 467 U.S. at pp. 257-258, fn. 5, 104 S.Ct. at pp. 2406-2407, fn. 5, quoting the New York Family Court Act, § 307.3(4).)

The high court explained in Schall: "There is no doubt that the Due Process Clause is applicable in juvenile proceedings. 'The problem,' we have stressed, 'is to ascertain the precise impact of the due process requirement upon such proceedings.' In re Gault, 387 U.S. 1, 13-14 [87 S.Ct. 1428, 1436-1437, 18 L.Ed.2d 527] (1967). We have held that certain basic constitu-

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tional protections enjoyed by adults accused of crimes also apply to juveniles. See id., at 31-57 [87 S.Ct. at 1445-1459] (notice of charges, right to counsel, privilege against self-incrimination, right to confrontation and cross-examination); In re Winship, 397 U.S. 358 [90 S.Ct. 1068, 25 L.Ed.2d 368] (1970) (proof beyond a reasonable doubt); Breed v. Jones, 421 U.S. 519 [95 S.Ct. 1779, 44 L.Ed.2d 346] (1975) (double jeopardy). But the Constitution does not mandate elimination of all differences in the treatment of juveniles. See, e.g., McKeiver v. Pennsylvania, 403 U.S. 528 [91 S.Ct. 1976, 29 L.Ed.2d 647] (1971) (no right to jury trial). The State has 'a parens patriae interest in preserving and promoting the welfare of the child,' Santosky v. Kramer, 455 U.S. 745, 766 [102 S.Ct. 1388, 1401, 71 L.Ed.2d 599] (1982), which makes a juvenile proceeding fundamentally different from an adult criminal trial. We have tried, therefore, to strike a balance--to respect the 'informality' and 'flexibility' that characterize juvenile proceedings, In re Winship, supra, [397 U.S.], at 366 [90 S.Ct. at 1073], and yet to ensure that such proceedings comport with the 'fundamental fairness' demanded by the Due Process Clause. Breed v. Jones, supra, [421 U.S.] at 531 [95 S.Ct. at 1786]; McKeiver, supra [403 U.S.], at 543 [91 S.Ct. at

1985] (plurality opinion)." (Schall, supra, 467 U.S. at p. 263, 104 S.Ct. at p. 2409.)

The court in Schall initially did indicate, in a footnote to its opinion, that the propriety of any detention "prior to a juvenile's initial appearance in Family Court" was not directly at issue in that case. (Schall, supra, 467 U.S. at pp. 257-258, fn. 5, 104 S.Ct. at pp. 2406-2407, fn. 5.) This was so because the petitioners had been afforded an "initial appearance," and therefore were not directly challenging the period of detention from arrest until their first appearance in court. But one must read on in Schall, for the court had elected to decide the class members' facial challenge to the constitutionality of the New York juvenile preventive detention statute even though petitioners' individual cases were moot due to their release from custody. (Schall, supra, 467 U.S. at p. 256, fn. 3, 104 S.Ct. at p. 2405, fn. 3; see, ante, at pp. 872-873, of 18 Cal.Rptr.2d, p. 1334, of 849 P.2d.) The court went on to consider the "initial appearance" requirement along with the other procedural components of the statutory scheme. Noting that the "initial appearance" could be adjourned for up to 72 hours, and that "the Family Court judge is not required to make a finding of probable cause at the initial appearance," the court nevertheless concluded that the lack of a requirement that factual probable cause be determined at the "initial appearance" "[did] not, under the circumstances, amount to a deprivation of due process." (Schall, supra, 467 U.S. at pp. 275-276, and fn. 27, 104 S.Ct. at pp. 2415-2416, and fn. 27.)

The high court explained that New York's preventive detention statute served the dual legitimate state objectives of protecting both society and the juvenile from the hazards of further criminal activity, by undertaking enforcement of the criminal law for the sake and protection of the community generally, while also serving as parens patriae for the benefit of the minor-detainee. (Schall, supra, 467 U.S. at pp. 264-274, 104 S.Ct. at pp. 2409-2415.) The court ultimately concluded the procedural protections afforded postarrest juvenile detainees under the New York statute satisfied the requirements of the due process clause of the Fourteenth

Amendment, and found the statutory scheme facially valid. (Ibid.)

It is important to note, however, that the court in Schall, in scrutinizing the class members' constitutional claims, examined all the procedural components of New York's statutory scheme--the "initial appearance" requirement (for appointment of counsel and advisement of rights), the formal "probable cause" hearing that followed 72 hours thereafter (analogous to our "detention hearing"), and the "factfinding hearing" (analogous to our "jurisdictional hearing")--and concluded that, taken together, they comprised "[such] flexible procedures [as] have been found constitutionally adequate under the Fourth Amendment, see Gerstein v. Pugh [supra, 420

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U.S. 103, 95 S.Ct. 854], and under the Due Process Clause, see Kent v. United States [(1966) 383 U.S. 541], at 557 [86 S.Ct. 1045, at 1055, 16 L.Ed.2d 84]." (Schall, supra, 467 U.S. at p. 277, 104 S.Ct. at p. 2417, italics added.)

Seven years after Schall was decided, the high court decided McLaughlin, supra, __ U.S. __, 111 S.Ct. 1661. The court set out in McLaughlin to further define the "promptness" requirement for making the Fourth Amendment probable cause determination required under Gerstein. The court concluded: "[A] jurisdiction that provides judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement of Gerstein." (McLaughlin, supra, __ U.S. at p. __, 111 S.Ct. at p. 1670.)

Unlike Schall, the facts in McLaughlin did not present the court with an opportunity to reach or discuss the Fourth Amendment probable cause requirement in the specific context of juvenile detention proceedings. Thus the court had no occasion in McLaughlin to consider the fundamental necessity, in the administration of juvenile criminal justice systems, to "strike a balance . . . respect[ing] the 'informality' and 'flexibility' that characterize juvenile proceedings [citation] . . . [while ensuring] that such proceedings comport with the

'fundamental fairness' demanded by the Due Process Clause. [Citations.]." (Schall, supra, 467 U.S. at p. 263, 104 S.Ct. at p. 2409.)

Most recently, however, the high court had the opportunity, in a post-McLaughlin case, to reaffirm some of the constitutional principles found relevant to juvenile detentions in Schall. In Flores, supra, __ U.S. __, 113 S.Ct. 1439, a class of alien juveniles who had been arrested by the Immigration and Naturalization Service (hereafter INS) on suspicion of being deportable, were detained pending deportation hearings pursuant to a regulation (8 C.F.R. § 242.24 (1992)) providing for the release of detained minors only to their parents, close relatives, or legal guardians, except in unusual and compelling circumstances. Pursuant to a consent decree entered into in the litigation, juveniles who were not released under the regulation's provisions had to be placed in juvenile care facilities that met or exceeded state licensing requirements for the provision of such services to dependent children. The juvenile class members in Flores contended they had a right under the federal Constitution and immigration laws to be routinely released into the custody of other "responsible adults."

Citing its earlier opinions in Santosky v. Kramer (1982) 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599, and Schall, supra, 467 U.S. 253, 104 S.Ct. 2403, the court reaffirmed that the State's parens patriae interest in "preserving and promoting the welfare of the child" (Santosky v. Kramer, supra, 455 U.S. at p. 766, 102 S.Ct. at p. 1401) renders juvenile proceedings fundamentally different from adult criminal proceedings. The court reiterated that " 'juveniles, unlike adults, are always in some form of custody,' Schall, supra, [467 U.S.] at 265 [104 S.Ct. at 2410], and where the custody of the parent or legal guardian fails, the government may (indeed, we have said must) either exercise custody itself or appoint someone else to do so. Ibid." (Flores, supra, __ U.S. at p. __, 113 S.Ct. at p. 1447, italics in original.)

The court in Flores rejected the respondent class members' "procedural due process" claim under the Fifth

Amendment. [4/] The high court's conclusions regarding the constitutionality of the INS juvenile detention procedures under scrutiny in that case bear repeating here, for they reinforce our conclusion that the Fourth Amendment analysis underlying the

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48-hour rule in McLaughlin does not, in isolation, adequately address all of the constitutional concerns that arise in juvenile detention cases.

The court explained that the deportation process ordinarily begins with a warrantless arrest by an INS officer who has reason to believe that the arrestee is in the United States in violation of an immigration law or regulation and is likely to escape before a warrant can be obtained. (Flores, supra, __ U.S. at p. __, 113 S.Ct. at p. 1459-1460.) Arrested aliens are almost always offered the choice of departing the country voluntarily, and the great majority apparently take that course. By statute, however, before the INS can seek execution of a voluntary departure form by a juvenile arrestee, the juvenile must communicate with either a parent, adult relative, friend, or with an organization found on the free legal services list. If the juvenile does not seek voluntary departure, the relevant statutes require that he or she be brought before an INS examining officer within 24 hours of his arrest. The "examining officer" must be someone other than the arresting officer, but is still a staff member of the INS's enforcement division, and is not a judge or magistrate. If the examiner finds prima facie evidence that the arrested alien is illegally in the United States, a formal deportation hearing is initiated

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[4/] The due process claim in Flores arose under the Fifth Amendment because aliens have a right to due process of law at deportation proceedings under the Fifth Amendment. (Flores, supra, __ U.S. at p. __, 113 S.Ct. at p. 1449; see The Japanese Immigrant Case (1903) 189 U.S. 86, 100-101, 23 S.Ct. 611, 614-615, 47 L.Ed. 721.) The discussion of Fifth Amendment procedural due process in Flores is functionally analogous to the Fourteenth Amendment procedural due process discussed in Schall.

through the issuance of an order to show cause, and within 24 hours the decision is made whether to continue the alien juvenile in custody or to release him. (Ibid.)

The INS must notify the alien juvenile of the commencement of a deportation proceeding, and of the decision as to custody, by serving a written form notice in English and Spanish. The front of the form notifies the alien of the allegations against him and the date of his deportation hearing. The back contains a section entitled "Notice of Custody Determination," in which the INS officer checks a box indicating whether the alien will be detained in the custody of the INS, released on his own recognizance, or released under bond. The form also advises the alien that he may request the "Immigration Judge" to redetermine the custody decision. The "Immigration Judge" is a quasi-judicial officer in the Executive Office for Immigration Review, a division "separated" from the INS enforcement staff. The alien juvenile must check one of two boxes, indicating he does or does not seek such review, and sign and date the form. If the alien requests a hearing before the "Immigration Judge" and is dissatisfied with the outcome, he may obtain further review by the Board of Immigration Appeals, and by the federal courts. (Flores, supra, __ U.S. at pp. __- __, 113 S.Ct. at pp. 1449-1450.)

The high court in Flores rejected the conclusion of the United States District Court and the in bank Court of Appeals for the Ninth Circuit that the INS procedures are flawed because they do not provide for automatic review by an "Immigration Judge" of the initial deportability and custody determinations. The court explained: "At least insofar as this facial challenge is concerned, due process is satisfied by giving the detained alien juveniles the right to a hearing before an immigration judge." (Flores, supra, __ U.S. at p. __, 113 S.Ct. at pp. 1450-1451, italics in original.) The court further rejected respondents' contention that the regulations were infirm because they failed to set forth a time period within which the hearing before the "Immigration Judge," when requested, must be held. (Ibid.)

In rejecting respondents' further claim that "the regulation is an abuse of discretion because it permits the INS, once having determined that an alien juvenile lacks an available relative or legal guardian, to hold the juvenile indefinitely," the court explained: "That is not so. The period of custody is inherently limited by the pending deportation hearing, which must be concluded with 'reasonable dispatch' to avoid habeas corpus. 8 U.S.C. § 1252(a)(1); cf. [United States v. Salerno], 481 U.S. 739, 747 [107 S.Ct. 2095, 2101, 95 L.Ed.2d 697] (1987) (noting time limits placed on pretrial detention by the Speedy Trial Act). It is expected that alien juveniles will remain in INS custody an average of only

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30 days [under the terms of the consent decree]. . . . There is no evidence that alien juveniles are being held for undue periods pursuant to regulation 242.24 [8 C.F.R. § 242.24 (1992)], or that habeas corpus is insufficient to remedy particular abuses." (Flores, supra, __ U.S. at p. __, 113 S.Ct. at p. 1454, fn. omitted.)

The court concluded in Flores: "We think the INS policy now in place is a reasonable response to the difficult problems presented when the Service arrests unaccompanied alien juveniles. It may well be that other policies would be even better, but 'we are [not] a legislature charged with formulating public policy.' Schall v. Martin, 467 U.S., at 281 [104 S.Ct. at 2419]. On its face, INS regulation 242.24 accords with both the Constitution and the relevant statute." (Flores, supra, __ U.S. at p. __, 113 S.Ct. at p. 1454.)

We recognize, of course, that the holding in Flores is of limited precedential value here, since that case arose under the due process clause of the Fifth Amendment (see, ante, at p. 878, fn. 4, of 18 Cal.Rptr.2d, p. 1340, fn. 4, of 849 P.2d), involved a class of deportable juvenile aliens who may not have enjoyed the same Fourth Amendment rights as juvenile citizens (see United States v. Verdugo-Urquidez (1990) 494 U.S. 259, 265-275, 110 S.Ct. 1056, 1060-1066, 108 L.Ed.2d 222), and involved the interpretation of immigration statutes as well as the terms of a consent decree. We nonetheless believe that the high court's constitutional analysis in Flores,

supra, __ U.S. __, 113 S.Ct. 1439, and its reliance in that case on several of the basic principles pertaining to juvenile detentions discussed in Schall, supra, 467 U.S. 253, 104 S.Ct. 2403, reinforces our conclusion that, in the context of juvenile proceedings, the court would not today find rigid application of the 48-hour rule of McLaughlin, supra, __ U.S. __, 111 S.Ct. 1661, compelled under the Fourth Amendment in juvenile detention proceedings.

We emphasize that we do not today suggest a juvenile arrestee facing postarrest detention has no Fourth Amendment liberty interest in a prompt determination of the legal cause for his or her extended detention. The Fourth Amendment principles at the core of the holding in Gerstein, supra, 420 U.S. 103, 95 S.Ct. 854, apply to juveniles as well as adults. The high court expressly reaffirmed as much eight years ago in Schall, supra, 467 U.S. at pages 264, 276-277, and footnote 27, 104 S.Ct. at pages 2409, 2416-2417, and footnote 27. [5/]

Our juvenile detention statutes are designed to protect those Fourth Amendment rights. The arresting officer must, within 24 hours of the arrest, prepare a written summary of the probable cause for taking the minor into temporary custody. (§ 626, subd. (d).) In contrast to adult criminal proceedings, the statutory presumptions require "immediate

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[5/] Although the court in Schall twice characterized its earlier holding in Gerstein to be "that a judicial determination of probable cause is a prerequisite to any extended restraint on the liberty of an adult accused of crime" (Schall, supra, 467 U.S. at pp. 274-275, [104 S.Ct. at p. 2415], italics added), that characterization cannot, in reason, be understood as an attempt by the court to limit the fundamental principles announced in Gerstein solely to adult detentions. The court subsequently made it clear in Schall that children have a protected liberty interest in "freedom from institutional restraints." (Id., at p. 265 [104 S.Ct. at p. 2410]; see In re Gault (1967) 387 U.S. 1, 27, 87 S.Ct. 1428, 1443, 18 L.Ed.2d 527.)

release" of the minor to the custody of his or her parents or legal guardian unless specific factors warranting extended detention are found to exist. (§ 628.) Even when such factors supportive of further detention are found to exist, the juvenile arrestee must nonetheless be released within 48 hours unless a wardship petition is filed within that initial 48-hour period. (§ 631, subd. (a).) If a wardship petition is filed, a formal, adversarial detention hearing, at which counsel is provided for both the minor and his parents or guardian, must be conducted "as soon as possible but in any event [no later than] the expiration of the next judicial day after a petition to declare the minor a ward . . . has been filed" (i.e., no later than 72 hours after arrest, excluding the exception for "nonjudicial days"). (§ 632, subd. (a).) At the detention hearing, the court must again

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consider "[t]he circumstances and gravity of the alleged offense" in determining whether extended pretrial detention is warranted under all the facts and circumstances. (§ 635.)

We hold that, with the exception of the provisions in the Welfare and Institutions Code exempting "nonjudicial days" from calculation of the maximum period of detention prior to the detention hearing, our statutory scheme passes constitutional muster under the Fourth Amendment principles discussed in Gerstein, supra, 420 U.S. 103, 95 S.Ct. 854, and expressly found applicable to juvenile detentions in Schall, supra, 467 U.S. 253, 104 S.Ct. 2403, as well as under the due process clause of the Fourteenth Amendment, per Schall's analysis. We further conclude, however, that the high court's adoption of the 48-hour rule in McLaughlin, supra, __ U.S. __, 111 S.Ct. 1661 was neither foreseen nor intended by the court to be rigidly operable in juvenile detention proceedings. Given the fundamental differences between juvenile and adult detention proceedings, we will not infer otherwise, absent an express and definitive ruling from the court to the contrary.

D. The Statutory Exception for "Nonjudicial Days"

As has been shown, our Legislature has deemed a 48-hour period minimally necessary to permit authorities to

garner the necessary facts about the crimes for which the minor was arrested; perform the necessary investigation into the minor's background and family circumstances; determine whether to release the minor outright, release him or her on a written promise to appear, "adjust" the case informally, or transfer custody of the minor to an appropriate agency or facility; and, if a declaration of wardship will be sought, refer the matter to the local prosecutorial agency for the preparation and filing of a section 602 petition. (§§ 626, 628, 631, subd. (a), 650, subd. (c).) If no wardship petition is filed within 48 hours of arrest, the minor must be released from custody. (§ 631, subd. (a).) If a petition is filed within 48 hours of the arrest, an additional maximum period of 24 hours is allowed in which to schedule and prepare for the adversarial "detention hearing" (§ 632, subd. (a)), at which the minor and his parents or guardian will be represented by counsel. (§§ 633, 634.)

However, the 48-hour period following arrest, in which a section 602 wardship petition must be filed or the minor released, can be extended for intervening "nonjudicial days." (§ 631, subds. (a) and (b).) Likewise, if a section 602 petition is filed, the additional 24-hour period within which the formal detention hearing must be conducted can be extended for any intervening "nonjudicial days." (§ 632, subds. (a) and (b).)

The court in Schall, supra, 467 U.S. 253, 104 S.Ct. 2403, in explaining why the New York Family Court Act provided more procedural protection for juveniles in many respects than was found to be minimally required under the Fourth Amendment for adults in Gerstein, supra, 420 U.S. 103, 95 S.Ct. 854, observed that: "[t]he initial appearance [in family court] may be adjourned for no longer than 72 hours or until the next court day, whichever is sooner, to enable an appointed law guardian or other counsel to appear before the court." (Id., at p. 275, 104 S.Ct. at p. 2416, italics added.)

In the context of announcing the 48-hour rule for extended postarrest detention of adults, the court in McLaughlin, supra, __ U.S. __, 111 S.Ct. 1661, likewise

explained: "The record indicates . . . that the County's current policy and practice do not comport fully with the principles we have outlined. The County's current policy is to offer combined proceedings [probable cause determination and arraignment] within two days, exclusive of Saturdays, Sundays, or holidays. As a result, persons arrested on Thursdays may have to wait until the following Monday before they receive a probable cause determination. The delay is even longer if there is an intervening holiday. Thus, the County's regular practice exceeds the 48-hour period we deem constitutionally permissible. . . ." (Id., at p. __, 111 S.Ct. at p. 1671.)

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The exception for "nonjudicial days" (e.g., weekends and holidays) embodied in sections 631 and 632 is best characterized as a rule of convenience for the members of the judiciary, public agencies, juvenile probation department, and all others who participate in the juvenile detention proceedings. From the minor-detainee's standpoint, however, there is nothing "convenient" about a rule that extends his or her detention hearing based solely on the fortuity of which day of the week (weekday, weekend or holiday) the arrest took place. Moreover, we find nothing characteristic of juvenile detention proceedings, in contrast to adult criminal proceedings, that would make such a rule any less injurious, or any more tolerable, under the Fourth Amendment.

In accord with the high court's holding in Schall, supra, 467 U.S. 253, 104 S.Ct. 2403, and its analogous determination in McLaughlin, supra, __ U.S. __, 111 S.Ct. 1661, we likewise find that the open-ended statutory exception for "nonjudicial days" embodied in California's juvenile detention statutes runs afoul of the minor-detainee's Fourth and Fourteenth Amendment rights, and cannot withstand constitutional scrutiny.

We hasten to add: It is not a proper function of this court to seek to legislate a procedural remedy for this constitutional infirmity. As the high court has cautioned: "[I]t is worth recalling that we are neither a legislature charged

with formulating public policy nor an American Bar Association committee charged with drafting a model statute." (Schall, supra, 467 U.S. at p. 281, 104 S.Ct. at p. 2419; see also Flores, supra, __ U.S. at p. __, 113 S.Ct. at p. 1454.) We hold only that in those cases in which minors arrested without a warrant on suspicion of criminal activity stand to be detained without a formal detention hearing, due to intervening "nonjudicial days," for longer than the statutory periods otherwise prescribed in sections 631 and 632, the Legislature and counties must devise appropriate procedures to accommodate the minors' constitutional rights in accordance with the views expressed herein. [6/]

III. CONCLUSION

The judgment of the Court of Appeal is affirmed.

PANELLI and BAXTER, JJ., concur.

ARABIAN, Justice, concurring.

I cannot endorse the due process analysis of the lead opinion because it fails to focus on the issue actually before the court, viz., whether the rule of County of Riverside v. McLaughlin (1991) __ U.S. __, 111 S.Ct. 1661, 114 L.Ed.2d 49 (McLaughlin) applies to juveniles. Like the dissent, I believe we are constrained to refract petitioner's contentions solely through a Fourth Amendment prism, for that is the limited basis of his constitutional claim. (Cf. Gerstein v. Pugh (1975)

[6/] We note that in 1992, the Legislature added subdivision (c) to Code of Civil Procedure section 134, which now specifically provides: "In any superior, municipal, or justice court, one or more departments of the court may remain open and in session for the transaction of any business which may come before the department in the exercise of the civil or criminal jurisdiction of the court, or both, on a judicial holiday or at any hours of the day or night, or both, as the judges of the court prescribe." (Stats.1992, ch. 460, § 2.)

420 U.S. 103, 111, 95 S.Ct. 854, 861, 43 L.Ed.2d 54 ["Both the standards and procedures for arrest and detention have been derived from the Fourth Amendment and its common-law antecedents."].) As I understand his position, petitioner does not contend that any provision of the statutory scheme governing juvenile adjudications violates due process. (Welf. & Inst.Code, § 602 et seq.) Rather, he maintains that he, like any adult in comparable circumstances, is entitled under the Fourth Amendment to a probable cause determination of suspected criminal activity within 48 hours of his warrantless arrest. (McLaughlin, supra, __ U.S. __, 111 S.Ct. 1661.) Given the specificity of this challenge, we should not resolve it by indirection upon a finding that since the statutory scheme does not violate due process, it passes muster under the Fourth Amendment as well. (See, e.g., New Jersey v.

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T.L.O. (1985) 469 U.S. 325, 105 S.Ct. 733, 83 L.Ed.2d 720 [4th Amend. search and seizure claim].) The question before us demands a more exact answer.

Unlike the dissent, however, I conclude that for juvenile detainees a probable cause determination within 72 hours satisfies the constitutional mandate of "promptness," in part because I do not find that McLaughlin, supra, __ U.S. __, 111 S.Ct. 1661, necessarily controls here. According to its factual premise, that case concerned only adults; and I am unpersuaded the holding perforce extends to juvenile detentions absent an express restriction of its scope. (Cf. McKeiver v. Pennsylvania (1971) 403 U.S. 528, 541, 545, 91 S.Ct. 1976, 1984, 1986, 29 L.Ed.2d 647.) In my view, the issue warrants an independent examination, bearing in mind both the general nature of the Fourth Amendment guaranty with its qualification of reasonableness and the particularized concerns of the juvenile justice system. (Ibid.; cf. New Jersey v. T.L.O., supra, 469 U.S. at pp. 337-343, 105 S.Ct. at pp. 740-743.)

While juveniles do not ipso facto possess the same constitutional rights as adults (see, e.g., New Jersey v. T.L.O., supra, 469 U.S. at p. 342, fn. 8, 105 S.Ct. at p. 743, fn. 8), it is now a settled proposition that the "promptness"

requirement of Gerstein v. Pugh, supra, 420 U.S. at pages 111-116, 95 S.Ct. at pages 861-864, embraces all warrantless detentions regardless of the detainee's age. (See, e.g., R.W.T. v. Dalton (8th Cir.1983) 712 F.2d 1225, 1230; Moss v. Weaver (5th Cir.1976) 525 F.2d 1258, 1259-1260.) Although juveniles are usually subject to greater restriction of their freedom by virtue of their minority, they do have a protectible liberty interest with respect to official restraint. (Schall v. Martin (1984) 467 U.S. 253, 265, 104 S.Ct. 2403, 2410, 81 L.Ed.2d 207.) And one cannot deny that detention by law enforcement adversely affects a juvenile at least as much as it does an adult. The question remains, however, to quantify the mandate of Gerstein for juveniles as the United States Supreme Court did for adults in McLaughlin, supra, __ U.S. at page __, 111 S.Ct. at page 1670. While we lack a direct answer, decisions of the high court provide some useful contours to the analytical framework.

In general, the juvenile context is highly relevant in determining whether and to what extent a particular constitutional principle applies to minors. (See, e.g., Schall v. Martin, supra, 467 U.S. at p. 265, 104 S.Ct. at p. 2410.) Depending upon the interest at stake, this circumstance may dictate that juveniles have rights coextensive with adults, debar them entirely, or necessitate some modification of rights. (See McKeiver v. Pennsylvania, supra, 403 U.S. at pp. 533-534, 91 S.Ct. at pp. 1980-1981.)

For example, in McKeiver v. Pennsylvania, supra, 403 U.S. 528, 91 S.Ct. 1976, the Supreme Court declined to extend the right to jury trial to juvenile adjudications. (Id., at p. 545, 91 S.Ct. at 1986.) In the court's view, superimposing this requirement on juvenile proceedings would not appreciably enhance the factfinding process, while at the same time it would impair the laudatory, if not always successful, goals of the system. (Id., at pp. 547-550, 91 S.Ct. at 1987-1989.) On the other hand, the court has ruled that minors are entitled to proof beyond a reasonable doubt (In re Winship (1970) 397 U.S. 358, 368, 90 S.Ct. 1068, 1075, 25 L.Ed.2d 368) and the defense of double jeopardy (Breed v. Jones (1975) 421 U.S. 519, 531, 95 S.Ct. 1779, 1786, 44

L.Ed.2d 346) to the same extent these constitutional guaranties protect adults because "there is little to distinguish" between adjudications and criminal trials relative to these principles. (Id., at p. 530, 95 S.Ct. at p. 1786.) In each instance, the minimal infringement on the traditional informality of juvenile proceedings did not outweigh the substantial concerns of the minor in having a fair determination of delinquency and limitation on multiple hearings. (Id., at pp. 536-539, 95 S.Ct. at pp. 1789-1790; In re Winship, supra, 397 U.S. at pp. 366-368, 90 S.Ct. at 1074-1075.)

In other cases, the Supreme Court has sought to harmonize the protectible interests of minors with the underlying constitutional principles. In the seminal case of In re Gault (1967) 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527, it determined that a juve-

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nile's right to due process when taken into custody for suspected criminal activity included, inter alia, the privilege against self-incrimination. (Id., at p. 55, 87 S.Ct. at 1458.) At the same time, the court acknowledged "that special problems may arise with respect to waiver of the privilege by or on behalf of children, and that there may well be some differences in technique--but not in principle--depending upon the age of the child and the presence and competence of parents." (Ibid.; see also id., at pp. 33-34, 87 S.Ct. at 1446-1447 [due process requires notice of charges to juvenile's parents as well as to juvenile]; Haley v. Ohio (1948) 332 U.S. 596, 599-601, 68 S.Ct. 302, 303-304, 92 L.Ed. 224 [admissions and confessions of juveniles require special caution].)

In New Jersey v. T.L.O., supra, the court considered "what limits, if any, the Fourth Amendment places on the activities of school authorities" who search students. (469 U.S. at p. 332, 105 S.Ct. at 737.) Although schoolchildren have an expectation of privacy (id., at pp. 337-339, 105 S.Ct. at pp. 740-741), the need to maintain order in the classroom "requires some easing of the restrictions to which searches by public authorities are ordinarily subject." (Id., at p. 340, 105

S.Ct. at 742.) Thus, in striking the balance of reasonableness, considerations unique to the particular circumstance qualified the scope of constitutional protection available to the juvenile.

Regardless of its ultimate conclusion in these cases, the Supreme Court has continually emphasized the need to maintain a measure of flexibility in its analysis to accommodate the special attention with which our society still endeavors to deal with youthful offenders. (See, e.g., New Jersey v. T.L.O., supra, 469 U.S. at p. 340, 105 S.Ct. at p. 742; Breed v. Jones, supra, 421 U.S. at p. 540, 95 S.Ct. at p. 1791; McKeiver v. Pennsylvania, supra, 403 U.S. at p. 547, 91 S.Ct. at p. 1987.) I believe this concern for flexibility is particularly relevant to the question of probable cause determinations because the detention of juveniles implicates additional considerations unique to their minority. (See, ante, pp. 873-875 of 18 Cal.Rptr.2d, pp. 1334-1336 of 849 P.2d.) It also segues with the explicit premise of the Fourth Amendment, which proscribes only "unreasonable" seizures. (Cf. New Jersey v. T.L.O., supra, 469 U.S. at pp. 340-341, 105 S.Ct. at pp. 742-743.)

These collateral circumstances do not necessarily preclude probable cause determinations within a shorter period; indeed, as the dissent suggests, every effort should be made to minimize the period of detention at this juncture in the adjudicatory process. Nevertheless, they provide a rational basis on which to premise some latitude beyond the 48-hour limit delineated in McLaughlin. (Cf. Schall v. Martin, supra, 467 U.S. at pp. 265-266, 104 S.Ct. at pp. 2410-2411.) Moreover, even with respect to adult detentions, the Supreme Court has reiterated that "probable cause determinations must be prompt--not immediate" to maintain a necessary measure of " 'flexibility' and 'experimentation' " within each state's criminal justice system. (McLaughlin, supra, __ U.S. at p. __, 111 S.Ct. at p. 1669; see Gerstein v. Pugh, supra, 420 U.S. at p. 123, 95 S.Ct. at p. 867.)

I therefore conclude that under Gerstein v. Pugh, supra, 420 U.S. 103, 95 S.Ct. 854, juveniles are entitled to a "prompt" probable cause determination following a

warrantless arrest as mandated by the Fourth Amendment. However, because the situation of a juvenile detainee differs sufficiently from that of an adult, this promptness requirement is satisfied if the determination is made within 72 hours with no extension for nonjudicial days. (Cf. McLaughlin, supra, __ U.S. at p. __, 111 S.Ct. at p. 1671 ["Under Gerstein, jurisdictions may choose to combine probable cause determinations with other pretrial proceedings, so long as they do so promptly."].)

MOSK, Justice, dissenting.

I dissent.

The Fourth Amendment to the United States Constitution--one of the core provisions of the Bill of Rights--declares that "The right of the people to be secure in

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their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

In Gerstein v. Pugh (1975) 420 U.S. 103, 111-116, 123-125, 95 S.Ct. 854, 867-869, 43 L.Ed.2d 54, the United States Supreme Court held that the Fourth Amendment mandates, as a prerequisite to extended restraint of liberty, a prompt judicial determination that there is probable cause to believe that a person has in fact committed a criminal offense following a warrantless arrest based on suspicion thereof.

In County of Riverside v. McLaughlin (1991) __ U.S. __, __, 111 S.Ct. 1661, 1670, 114 L.Ed.2d 49, the court defined "promptness" under Gerstein as generally within 48 hours of the warrantless arrest.

Thus, under the Fourth Amendment as construed by Gerstein and McLaughlin, a law-abiding person wrongfully

arrested without a warrant is guaranteed his freedom within about 48 hours.

Today, a majority of this court refuse to honor that guaranty when the person in question happens to be a juvenile.

I cannot join in such a breach of our constitutional obligation.

I

On July 25, 1991, petitioner Alfredo A. submitted a petition for writ of habeas corpus to the Court of Appeal for the Second Appellate District. His allegations were to the following effect.

On July 24, 1991, petitioner, who was then 16 years of age, was arrested in Los Angeles without a warrant for possession of cocaine base for sale. (Health & Saf.Code, § 11351.5.) He was placed in the custody of the probation department in juvenile hall. He was, or would soon be, restrained of his liberty in violation of the Fourth Amendment without a prompt judicial probable cause determination within 48 hours of his warrantless arrest, as required by Gerstein and McLaughlin. As a general matter, the juvenile court law (Welf. & Inst.Code, § 200 et seq.) does not mandate such a determination for a juvenile. It does, however, specify a formal, adversarial probable cause or "detention" hearing as many as seven days after a juvenile's warrantless arrest. (Id., § 632 et seq.) The superior court sitting as the juvenile court had earlier adopted as its "official position"--in accordance with a requested opinion by the county counsel based on Schall v. Martin (1984) 467 U.S. 253, 104 S.Ct. 2403, 81 L.Ed.2d 207--that Gerstein's promptness requirement, at least as defined by McLaughlin, is not applicable to juveniles.

Through these allegations, petitioner effectively made a "systemic" Fourth Amendment challenge to the superior court's "official position." In his prayer for relief, he sought

immediate release from custody or an immediate judicial probable cause determination.

On July 26, 1991, Division Three of the Court of Appeal for the Second Appellate District caused its clerk to issue an order (1) deeming petitioner's submission to be a petition for writ of mandate against the superior court and (2) directing that court to show cause why a peremptory writ of mandate should not issue compelling it to comply with Gerstein's promptness requirement, as defined by McLaughlin, with regard to juveniles as well as adults. The superior court subsequently filed opposition as respondent.

Also on July 26, 1991, the People submitted a petition to the juvenile court to declare petitioner a ward of the court. (Welf. & Inst.Code, § 602.) They alleged that he came within its jurisdiction on the ground that on July 24, 1991, he was in possession of cocaine (Health & Saf.Code, § 11351) and cocaine base (id., § 11351.5) for sale.

On July 29, 1991, petitioner was brought to the juvenile court and released from custody, apparently because the probation department had not submitted a detention report. He waived time for arraignment. The matter was then continued to August

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19, 1991. Further proceedings, if any, are not reflected in the record.

On December 5, 1991, rejecting petitioner's systemic Fourth Amendment challenge to the superior court's "official position," the Court of Appeal denied his petition. At the outset, it determined that the issue presented, even though moot as to petitioner because of his release from custody, remained suitable for resolution because, in words it quoted from Gerstein, the underlying question was " 'capable of repetition, yet evading review.' " (Quoting Gerstein v. Pugh, supra, 420 U.S. at p. 110, fn. 11, 95 S.Ct. at p. 861, fn. 11.) It then set out to answer the question posed, viz., whether the superior court's "official position" is contrary to the Fourth Amendment, by addressing a question not posed, viz.,

whether the juvenile court law is compatible with "fundamental fairness" under the Fourteenth Amendment's due process clause. It held that the superior court's "official position" did not offend the Fourth Amendment.

On January 8, 1992, petitioner filed a petition for review. On February 20, this court granted his request in order to determine whether Gerstein's promptness requirement is applicable to juveniles and, if so, whether McLaughlin's definition of "promptness" operates in this setting.

II

Before the issue on which this court granted review may properly be resolved, its suitability for resolution must be addressed. Little discussion is called for. In fact, the words the Court of Appeal quoted from Gerstein are sufficient: the point is " 'capable of repetition, yet evading review.' " (Gerstein v. Pugh, supra, 420 U.S. at p. 110, fn. 11, 95 S.Ct. at p. 861, fn. 11.) As the Gerstein court explained: "Pretrial detention is by nature temporary, and it is most unlikely that any given individual could have his constitutional claim decided on appeal before he is either released or convicted. The individual could nonetheless suffer repeated deprivations, and it is certain that other persons similarly situated will be detained under the allegedly unconstitutional procedures." (Ibid.)

III

The question before the court is bipartite. Is Gerstein's promptness requirement applicable to juveniles? If so, does McLaughlin's definition of "promptness" operate in this setting?

A

In Gerstein, the United States Supreme Court held that the Fourth Amendment mandates a prompt judicial probable cause determination as a prerequisite to extended restraint of

liberty following a warrantless arrest. (Gerstein v. Pugh, supra, 420 U.S. at pp. 111-116, 123-125, 95 S.Ct. at pp. 867-869.) [1/]

In reaching this conclusion, the Gerstein court sought to reconcile, or at least accommodate, an individual's Fourth Amendment rights and the state's legitimate interest in law enforcement. (Gerstein v. Pugh, supra, 420 U.S. at pp. 111-113, 95 S.Ct. at pp. 861-863.)

Under what the Gerstein court called its "practical compromise," "a policeman's on-the-scene assessment of probable cause provides legal justification for arresting a person suspected of crime, and for a brief period of detention to take the administrative steps incident to arrest. Once the suspect is in custody, however, the reasons that justify dispensing with the magistrate's neutral judgment evaporate. There no longer is any danger that the suspect will escape or commit further crimes while the police submit their evidence to a magistrate. And, while the State's reasons for taking summary action subside, the suspect's need for a neutral determination of probable cause increases significantly. The consequences of prolonged detention may be more serious than the interference occasioned by arrest. Pretrial confinement

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may imperil the suspect's job, interrupt his source of income, and impair his family relationships . . . . Even pretrial release may be accompanied by burdensome conditions that effect a significant restraint of liberty . . . . When the stakes are this high, the detached judgment of a neutral magistrate is essential if the Fourth Amendment is to furnish meaningful protection from unfounded interference with liberty." (Gerstein v. Pugh, supra, 420 U.S. at pp. 113-114, 95 S.Ct. at p. 863, citations omitted.)

[1/] The Fourth Amendment, of course, is applicable to the states through the due process clause of the Fourteenth Amendment. (Wolf v. Colorado (1949) 338 U.S. 25, 27-28, 69 S.Ct. 1359, 1361-1362, 93 L.Ed. 1782.)

Thus, the Gerstein court made plain that the prompt judicial probable cause determination mandated by the Fourth Amendment must be "prompt" in terms of the time that is required for the state "to take the administrative steps incident to arrest" (Gerstein v. Pugh, supra, 420 U.S. at p. 114, 95 S.Ct. at p. 863), such as booking, photographing, and fingerprinting (County of Riverside v. McLaughlin, supra, __ U.S. at p. __, 111 S.Ct. at p. 1671).

The Gerstein court also made plain that this prompt judicial probable cause determination does not require the "full panoply of adversary safeguards" of "counsel, confrontation, cross-examination, and compulsory process . . . ." (Gerstein v. Pugh, supra, 420 U.S. at p. 119, 95 S.Ct. at p. 866.) Rather, "a nonadversary proceeding [based] on hearsay and written testimony" is sufficient. (Id. at p. 120, 95 S.Ct. at p. 866.) "The sole issue is whether there is probable cause for detaining the arrested person pending further proceedings. This issue can be determined reliably without an adversary hearing. The standard is the same as that for arrest. That standard--probable cause to believe the suspect has committed a crime--traditionally has been decided by a magistrate in a nonadversary proceeding on hearsay and written testimony. . . ." (Ibid., fn. omitted.) The court noted: "Because the standards [for arrest and detention] are identical, ordinarily there is no need for further investigation before the probable cause determination can be made." (Id. at p. 120, fn. 21, 95 S.Ct. at p. 866, fn. 21.)

The Gerstein court "recognize[d] that state systems of criminal procedure vary widely. There is no single preferred pretrial procedure, and the nature of the probable cause determination usually will be shaped to accord with a State's pretrial procedure viewed as a whole." (Gerstein v. Pugh, supra, 420 U.S. at p. 123, 95 S.Ct. at p. 868.) It also "recognize[d] the desirability of flexibility and experimentation by the States. It may be found desirable, for example, to make the probable cause determination at the suspect's first appearance before a judicial officer, . . . or the determination may be incorporated into the procedure for setting bail or fixing other conditions of pretrial release. In some States,

existing procedures may satisfy the requirement of the Fourth Amendment. Others may require only minor adjustment . . . ." (Id. at pp. 123-124, 95 S.Ct. at p. 868, fn. and citation omitted.) But it declared: "Whatever procedure a State may adopt, it must provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty, and this determination must be made by a judicial officer . . . promptly after arrest" when the arrest itself is made without a warrant. (Id. at pp. 124-125, 95 S.Ct. at pp. 868-869, fn. omitted.)

B

In McLaughlin, the United States Supreme Court undertook to define "promptness" under Gerstein. (County of Riverside v. McLaughlin, supra, __ U.S. at p. __, 111 S.Ct. at p. 1665.) The facts there are similar to those here. At issue was Riverside County's policy of combining judicial probable cause determinations with its arraignment procedures, which resulted in a delay of as many as seven days after a person's warrantiess arrest. The Courts of Appeals were in conflict as to the meaning of "promptness." The Fourth, Seventh, and Ninth Circuits declared or suggested that a judicial probable cause determination is "prompt" only if it is provided immediately after the state has "take[n] the administrative steps incident to arrest" (Gerstein v. Pugh, supra, 420 U.S. at p. 114, 95

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S.Ct. at p. 863). (See Fisher v. Washington Metro. Area Transit Authority (4th Cir.1982) 690 F.2d 1133, 1139-1140; Llaguno v. Mingey (7th Cir.1985) 763 F.2d 1560, 1567-1568 (in bank); McLaughlin v. County of Riverside (9th Cir.1989) 888 F.2d 1276, 1278, vacated sub nom. County of Riverside v. McLaughlin, supra, __ U.S. __, 111 S.Ct. 1661, 114 L.Ed.2d 49.) The Second Circuit held against the requirement of "immediacy." (See Williams v. Ward (2d Cir.1988) 845 F.2d 374, 385-386.)

The McLaughlin court adhered to, and indeed reaffirmed, the holding of Gerstein that the Fourth Amendment mandates a prompt judicial probable cause determination as

a prerequisite to extended restraint of liberty following a warrantless arrest. (County of Riverside v. McLaughlin, supra, __ U.S. at pp. __ - __, 111 S.Ct. at pp. 1667-1669.)

The McLaughlin court also remained faithful to Gerstein's view that "promptness" must be measured in terms of the time that is required for the state "to take the administrative steps incident to arrest" (Gerstein v. Pugh, supra, 420 U.S. at p. 114, 95 S.Ct. at p. 863). (See County of Riverside v. McLaughlin, supra, __ U.S. at p. __, 111 S.Ct. at p. 1671.) In its own words: "Under Gerstein, jurisdictions may choose to combine probable cause determinations with other pretrial proceedings, so long as they do so promptly. This necessarily means that only certain proceedings are candidates for combination. Only those proceedings that arise very early in the pretrial process--such as bail hearings and arraignments--may be chosen." (Id. at p. __, 111 S.Ct. at p. 1671.) The reason is plain. To allow "promptness" to be defined with reference to other "steps" that a state might desire to "take" beyond those "incident to arrest"--for example, the holding of a preliminary examination--would render the requirement nugatory. A federal constitutional mandate that is designed to constrain the states cannot be dependent on the individual policy choices that any given state might choose to make.

All the same, the McLaughlin court recognized that the bare mandate of a "prompt" judicial probable cause determination had proved inadequate. It stated: "Unfortunately, as lower court decisions applying Gerstein have demonstrated, it is not enough to say that probable cause determinations must be 'prompt.' This vague standard simply has not provided sufficient guidance. Instead, it has led to a flurry of systemic challenges to city and county practices, putting federal judges in the role of making legislative judgments and overseeing local jailhouse operations." (County of Riverside v. McLaughlin, supra, __ U.S. at p. __, 111 S.Ct. at p. 1669.)

The McLaughlin court declined to hold that a judicial probable cause determination is "prompt" only if it is

provided immediately after the state has "take[n] the administrative steps incident to arrest" (Gerstein v. Pugh, supra, 420 U.S. at p. 114, 95 S.Ct. at 863). It stated: "Taking into account the competing interests articulated in Gerstein, we believe that a jurisdiction that provides judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement of Gerstein. For this reason, such jurisdictions will be immune from systemic challenges." (County of Riverside v. McLaughlin, supra, __ U.S. at p. __, 111 S.Ct. at p. 1670.)

The McLaughlin court then added: "This is not to say that the probable cause determination in a particular case passes constitutional muster simply because it is provided within 48 hours. Such a hearing [2/] may nonetheless violate Gerstein if the arrested individual can prove that his or her probable cause determination was delayed unreasonably." (County of Riverside v. McLaughlin, supra, __ U.S. at p. __, 111 S.Ct. at p. 1670.) But "[w]here

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an arrested individual does not receive a probable cause determination within 48 hours, the calculus changes. In such a case, the arrested individual does not bear the burden of proving an unreasonable delay. Rather, the burden shifts to the government to demonstrate the existence of a bona fide emergency or other extraordinary circumstance. The fact that in a particular case it may take longer than 48 hours to consolidate pretrial proceedings does not qualify as an extraordinary circumstance. Nor, for that matter, do intervening weekends. A jurisdiction that chooses to offer combined proceedings must do so as soon as is reasonably

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2/ Here and a few other places in McLaughlin, the court referred to a "probable cause hearing" as the subject of Gerstein. "But this unfortunate phrase (used much less often than the more accurate term, 'probable cause determination') should not be taken to suggest an adversary hearing is required." (2 LaFave, Search and Seizure (2d ed., 1993 pocket supp.) § 5.1, p. 106, fn. 198.4.)

feasible, but in no event later than 48 hours after arrest." (Id. at p. __, 111 S.Ct. at p. 1670.)

It must be noted that McLaughlin was not a unanimous decision. In a dissenting opinion in which Justice Blackmun and Justice Stevens joined, Justice Marshall would have defined "promptness" under Gerstein to incorporate the "immediacy" requirement, i.e., a judicial probable cause determination is "prompt" only if it is provided immediately after the state has "take[n] the administrative steps incident to arrest" (Gerstein v. Pugh, supra, 420 U.S. at p. 114, 95 S.Ct. at p. 863). (County of Riverside v. McLaughlin, supra, __ U.S. at p. __, 111 S.Ct. at p. 1671 (dis. opn. of Marshall, J.).) In a separate dissenting opinion, Justice Scalia would have adopted a similar definition. (Id. at pp. __ - __, 111 S.Ct. at pp. 1672-1675 (dis. opn. of Scalia, J.).) He would also have rejected the court's "outer time limit" of 48 hours in favor of a line drawn at "certainly no more than 24 hours." (Id. at p. __, 111 S.Ct. at p. 1676 (dis. opn. of Scalia, J.).)

IV

As stated above, the question before this court is whether Gerstein's promptness requirement is applicable to juveniles and, if so, whether McLaughlin's definition of "promptness" operates in this setting.

A

The first issue is the applicability of Gerstein's promptness requirement to juveniles.

Gerstein declares, both expressly and impliedly, from beginning to end, that the Fourth Amendment's protection extends to "persons" or "individuals." It does not purport to limit the constitutional guaranty to adults or even to qualify its benefit to juveniles.

I find no reason within Gerstein's four corners to cabin its holding. The Gerstein court did not itself choose to restrict

the scope of the requirement that it established. I decline to do what it did not.

Neither do I find outside Gerstein any reason to delimit the decision.

It was firmly established almost a decade before Gerstein was handed down that "the Bill of Rights is [not] for adults alone." (In re Gault (1967) 387 U.S. 1, 13, 87 S.Ct. 1428, 1436, 18 L.Ed.2d 527.)

Indeed, this court itself has expressly held that among the rights of the United States Constitution to which juveniles are entitled "is the guarantee of freedom from unreasonable searches and seizures contained in the Fourth Amendment. . . ." (In re William G. (1985) 40 Cal.3d 550, 557, 221 Cal.Rptr. 118, 709 P.2d 1287; accord, e.g., People v. Chard (Colo.1991) 808 P.2d 351, 353 [holding that the "constitutional guarantees" to which juveniles are entitled include "protection from unreasonable searches and seizures under the fourth amendment"]; In re Order Reg. Fingerprinting of Juv. (1989) 42 Ohio St.3d 124, 126, 537 N.E.2d 1286 [stating that "it is well-settled that a juvenile is as entitled as an adult to the constitutional protections of the Fourth Amendment"]; Roberts v. Mills (1981) 290 Ore. 441, 444, 622 P.2d 1094 [holding in substance that the Fourth Amendment covers juveniles as well as adults].)

To be sure, the particular commands and prohibitions of the Fourth Amendment may vary in some respects for adults and juveniles. The basic criterion of the constitutional provision is, of course, "reasonableness." (e.g., Florida v. Jimeno (1991) __ U.S. __, __, 111 S.Ct. 1801, 1803, 114 L.Ed.2d 297 ["The touchstone of the Fourth Amendment is reasonableness."].)

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Whatever differentiation may be justified in some areas for adults and juveniles under the Fourth Amendment is not justified here. In McLaughlin, the court predicated Gerstein's promptness requirement on the proposition that "[a] State

has no legitimate interest in detaining for extended periods individuals who have been arrested without probable cause." (County of Riverside v. McLaughlin, supra, __ U.S. at p. __, 111 S.Ct. at p. 1669.) This applies to all individuals--whether or not they have attained the age of majority. When probable cause is lacking, detention is unsupported as a matter of law. That proposition does not depend on how old the detainee is. The presence of youth does not make up for the absence of probable cause.

I recognize that the state, as parens patriae, may have a legitimate interest in detaining a juvenile for criminal activity prior to trial. That interest, however, is not served by holding Gerstein's promptness requirement inapplicable. Without question, an adult arrested without probable cause must be released as soon as reasonably possible. The reason: grounds for detention are lacking. So too, a juvenile arrested without probable cause must be released as soon as reasonably possible. The reason is the same. Absent probable cause, the state's exercise of its power to preserve and promote the welfare of the child is without support. For juveniles as for adults, Gerstein's promptness requirement operates to conserve and allocate resources by limiting the class of detainees to those who are properly subject to detention. Of course, the state, as parens patriae, may have a legitimate interest in detaining a juvenile for reasons unrelated to criminal activity. But no such interest is implicated here.

I also recognize that, in detaining a juvenile for criminal activity prior to trial, the state may use means and/or facilities different from those it uses for adults. That fact, however, is not determinative. It simply cannot be said that the restraint of liberty imposed on a juvenile is somehow less significant, in and of itself, than that imposed on an adult. Indeed, "[p]retrial detention is an onerous experience, especially for juveniles. . . ." (Moss v. Weaver (5th Cir.1976) 525 F.2d 1258, 1260, italics added; see In re William M. (1970) 3 Cal.3d 16, 30-31, 89 Cal.Rptr. 33, 473 P.2d 737 [to similar effect].)

Moreover, it appears that since Gerstein was decided, all reported decisions that have considered the question to resolution have held or stated, expressly or impliedly, that Gerstein is applicable to all "persons" or "individuals," juveniles as well as adults. (See, e.g., R.W.T. v. Dalton (8th Cir.1983) 712 F.2d 1225, 1230 [holding that under Gerstein, "juveniles who are detained because they are suspected of committing criminal acts must be afforded a prompt probable-cause hearing"--thereby deciding a question left open in United States v. Allen (8th Cir.1978) 574 F.2d 435, 439 & fn. 11]; Moss v. Weaver, supra, 525 F.2d at pp. 1259-1260 [holding that Gerstein's promptness requirement is applicable to juveniles]; JV-114246 v. Superior Court (Ct.App.1988) 159 Ariz. 357, 358, 767 P.2d 705, 706 [same], following Bell v. Superior Court in & for Cty. of Pima (Ct.App.1977) 117 Ariz. 551, 553-554, 574 P.2d 39, 40 [same]; J.T. v. O'Rourke in and for the Tenth Jud. Dist. (Colo.1982) 651 P.2d 407, 409 [holding that under Gerstein, "a juvenile who is detained is entitled to a preliminary [probable cause] hearing by constitutional mandate"]; Roberts v. Mills, supra, 290 Ore. at p. 444, 622 P.2d 1094 [holding in substance that Gerstein's promptness requirement is applicable to juveniles].)

Therefore, I conclude that Gerstein's promptness requirement is indeed applicable to juveniles.

B

The second issue is whether McLaughlin's definition of "promptness" operates in the juvenile setting.

McLaughlin declares, both expressly and impliedly, from beginning to end, that its definition of "promptness" extends to "probable cause determinations" generally. It does not purport to limit its scope to adults or even to qualify its meaning for juveniles.

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I do not discern in McLaughlin itself any basis on which to restrict its definition of "promptness" against juveniles. Quite the contrary. The reasoning of the

McLaughlin court is premised on an assessment that the "undefined" promptness requirement of Gerstein is simply too "vague" a "standard." (County of Riverside v. McLaughlin, supra, __ U.S. at p. __, 111 S.Ct. at p. 1669.) That assessment holds as true for juvenile proceedings relating to minors as for criminal actions involving adults. Perhaps truer. For if "it is not enough to say that probable cause determinations must be 'prompt' " for criminal actions (id. at p. __, 111 S.Ct. at p. 1669), which are governed by a procedural law that is relatively well defined, a fortiori it is not nearly enough for juvenile proceedings, which are guided by norms of another sort. Similarly, if the "undefined" promptness requirement has already "led to a flurry of systemic challenges to city and county practices [in criminal actions], putting federal judges in the role of making legislative judgments and overseeing local jailhouse operations" (id. at p. __, 111 S.Ct. at p. 1669), it will surely lead to like challenges in juvenile proceedings--of which the present is, apparently, only the first--involving the state judiciary as well as the federal in matters that belong largely to the other branches of government.

Neither do I discern any basis outside McLaughlin on which to condition its definition of "promptness" against juveniles. As stated, juveniles as well as adults are entitled to the protections of the Fourth Amendment. As also stated, the basic criterion of the constitutional provision is "reasonableness." The definition articulated by the McLaughlin court serves to give content to this test. No reason appears to deny its benefit to juveniles. Unquestionably, "it is not enough to say that probable cause determinations must be 'prompt' " (County of Riverside v. McLaughlin, supra, __ U.S. at p. __, 111 S.Ct. at p. 1669) when the state acts as enforcer of the criminal law for the sake of the community generally. The same is true when the state acts as parens patriae for the benefit of the child. The word "prompt" is no less "vague" in the latter situation than in the former. As stated, under the Fourth Amendment as construed by Gerstein and McLaughlin, a law-abiding person wrongfully arrested without a warrant is guaranteed his freedom within about 48 hours. It would be unreasonable to

hold that when the person in question happens to be a juvenile, the guaranty is illusory.

Therefore, I conclude that McLaughlin's definition of "promptness" does in fact operate in the juvenile setting.

C

In conducting my analysis, I have not overlooked Schall v. Martin, supra, 467 U.S. 253, 104 S.Ct. 2403, which was decided nine years after Gerstein and seven years before McLaughlin. There, the United States Supreme Court held that a section of the New York Family Court Act was not invalid under the due process clause of the Fourteenth Amendment. (Schall v. Martin, supra, 467 U.S. at pp. 256-257, 263-281, 104 S.Ct. at pp. 2405-2406, 24092419.) The provision in question authorized court-ordered "preventive detention" of a juvenile accused of delinquency, i.e., pretrial detention based on a judicial finding that there is a "serious risk" that the juvenile " 'may before the return date commit an act which if committed by an adult would constitute a crime.' " (Id. at p. 255, 104 S.Ct. at 2405.) The court expressly noted that the propriety of detention before the juvenile was even given an opportunity to request a judicial probable cause determination was "not at issue": the sole question concerned "judicially ordered [preventive] detention." (Id. at p. 258, fn. 5, 104 S.Ct. at p. 2406, fn. 5.)

In scrutinizing the New York statutory scheme, the Schall court asked whether the authorization of court-ordered preventive detention was compatible with "fundamental fairness" under the Fourteenth Amendment's due process clause. (Schall v. Martin, supra, 467 U.S. at p. 263, 104 S.Ct. at p. 2409.) It identified two subsidiary inquiries. First, did court-ordered preventive detention under the statutory provision serve a legitimate state objective?

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(Id. at pp. 263-264, 104 S.Ct. at pp. 2409-2410.) Second, were the procedural safeguards contained therein adequate against erroneous and unnecessary restraints of liberty? (Id. at p. 264, 104 S.Ct. at pp. 2409-2410.)

At the outset, the Schall court observed: "There is no doubt that the Due Process Clause is applicable in juvenile proceedings. 'The problem . . . is to ascertain the precise impact of the due process requirement upon such proceedings.' " (Schall v. Martin, supra, 467 U.S. at p. 263, 104 S.Ct. at p. 2409.) It went on: "[C]ertain basic constitutional protections enjoyed by adults accused of crimes also apply to juveniles. . . . But the Constitution does not mandate elimination of all differences in the treatment of juveniles. . . . The State has 'a parens patriae interest in preserving and promoting the welfare of the child,' . . . which makes a juvenile proceeding fundamentally different from an adult criminal trial." (Ibid., citations omitted.) In view thereof, it had "tried . . . to strike a balance--to respect the 'informality' and 'flexibility' that characterize juvenile proceedings, . . . and yet to ensure that such proceedings comport with the 'fundamental fairness' demanded by the Due Process Clause." (Ibid., citation omitted.)

The Schall court concluded that the New York statutory scheme with its authorization of court-ordered preventive detention was indeed compatible with "fundamental fairness" under the Fourteenth Amendment's due process clause. It did so because it answered each of the two subsidiary inquiries in the affirmative.

First, the Schall court held that court-ordered preventive detention under the New York statutory scheme served the legitimate state objective of protecting both society and the juvenile from the hazards of pretrial crime. (Schall v. Martin, supra, 467 U.S. at pp. 264-274, 104 S.Ct. at pp. 2409-2415.) On this point, it explained that in aiming at such protection, the state undertook to act as enforcer of the criminal law for the sake of the community generally and also as parens patriae for the benefit of the child. (Id. at pp. 264-266, 104 S.Ct. at pp. 2409-2411.)

Second, the Schall court held that the procedural safeguards contained in the New York statutory scheme were adequate against erroneous and unnecessary restraints of liberty. (Schall v. Martin, supra, 467 U.S. at pp. 274-281, 104

S.Ct. at 2415-2419.) In this regard, it observed that under both the Fourth Amendment as construed by Gerstein and the Fourteenth Amendment's due process clause as interpreted in various decisions involving juvenile proceedings, there was a common concern with "flexibility" and "informality." (Id. at p. 275, 104 S.Ct. at pp. 2415-2416.) It indicated that Gerstein had found certain "flexible procedures," which included a formal, adversarial probable cause hearing within five days of a warrantless arrest, to be adequate for the Fourth Amendment. (Id. at p. 277 & fn. 28, 104 S.Ct. at p. 2416 & fn. 28.) It made clear that it found similar procedures under the New York statutory scheme, which included a formal, adversarial probable cause hearing within at most nine days of a warrantless arrest, to be sufficient for the Fourteenth Amendment's due process clause.

After even brief consideration, it becomes plain that Schall does not affect the conclusion that Gerstein's promptness requirement is indeed applicable to juveniles and that McLaughlin's definition of "promptness" does in fact operate in this setting.

"It is axiomatic," of course, "that cases are not authority for propositions not considered." (People v. Gilbert (1969) 1 Cal.3d 475, 482, fn. 7, 82 Cal.Rptr. 724, 462 P.2d 580; accord, McDowell & Craig v. City of Santa Fe Springs (1960) 54 Cal.2d 33, 38, 4 Cal.Rptr. 176, 351 P.2d 344.)

To begin with, Schall is based on the Fourteenth Amendment's due process clause. Gerstein and McLaughlin, by contrast, rest on the Fourth Amendment. Indeed, the Schall court effectively declared that its reach did not extend to the Fourth Amendment question presented here when it expressly noted that it was solely concerned with "judicially ordered [preventive]

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detention." (Schall v. Martin, supra, 467 U.S. at p. 258, fn. 5, 104 S.Ct. at p. 2406, fn. 5.) Moreover, the Schall court referred only to formal, adversarial probable cause hearings, and not the informal, nonadversarial judicial probable cause

determinations discussed in Gerstein and McLaughlin. Lastly, and perhaps most important, the Schall court dealt with a situation in which the juvenile was already detained pursuant to court order--unlike the situation here, where he was not.

To be sure, at one point in its opinion the Schall court stated: "In Gerstein . . . , we held that a judicial determination of probable cause is a prerequisite to any extended restraint on the liberty of an adult accused of crime." (Schall v. Martin, supra, 467 U.S. at pp. 274-275, 104 S.Ct. at pp. 2415-2416, italics added to "adult.") And at another point: "In many respects, the [New York statutory scheme] provides far more predetention protection for juveniles than we found to be constitutionally required for a probable-cause determination for adults in Gerstein." (Id. at p. 275, 104 S.Ct. at p. 2415, italics added to "adults.")

The Schall court's two dicta, isolated and irrelevant as they are, cannot reasonably be read as an after-the-fact attempt to limit Gerstein to adults, but must be viewed merely as a reflection of the general factual context out of which Gerstein arose. Indeed, it appears that no reported decision--with the singular exception of the opinion of the Court of Appeal below--has construed this language to impose such a limitation. This is certainly true of McLaughlin. In that case, in which the parties and amici curiae cited these words, the court could easily have limited Gerstein to adults. Conspicuously, it did not do so.

It can perhaps be argued that there is tension between Schall and McLaughlin. The former implies that a formal, adversarial probable cause hearing within at most nine days of the warrantless arrest of a juvenile who is already in court-ordered preventive detention suffices for the Fourteenth Amendment's due process clause. By contrast, the latter holds that a judicial probable cause determination, albeit informal and nonadversarial, is required by the Fourth Amendment generally within 48 hours of a warrantless arrest.

Any such tension, however, must necessarily be resolved in favor of McLaughlin and against Schall. By its

terms, the Schall implication depends on Gerstein's "undefined" promptness requirement and Gerstein's consequent approval of a delay of five days between a warrantless arrest and a formal, adversarial probable cause hearing. The McLaughlin holding, however, expressly defines "promptness" as generally within 48 hours and thereby withdraws approval of a 5-day delay. Therefore, the Schall implication simply does not survive the McLaughlin holding.

In conducting my analysis, I have also not overlooked Reno v. Flores (1993) __ U.S. __, 113 S.Ct. 1439, 123 L.Ed.2d 1 (hereafter Flores). That case involved an Immigration and Naturalization Service regulation governing the detention of allegedly deportable alien juveniles. There, a majority of the United States Supreme Court rejected a constitutional challenge to the regulation based solely on the due process clause of the Fifth Amendment. They cited Schall. But they did not even allude to the Fourth Amendment, less still Gerstein or McLaughlin. That, of course, is not surprising. It appears that deportable aliens are not even within the protection of the Fourth Amendment. In United States v. Verdugo-Urquidez (1990) 494 U.S. 259, 265, 110 S.Ct. 1056, 1061, 108 L.Ed.2d 222, the United States Supreme Court stated, albeit only in dictum, that " 'the people' protected by the Fourth Amendment . . . refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community"--among whom deportable aliens do not seem to number. As explained, a case, like Schall, is not authority for a proposition it did not consider. A fortiori, a case, like Flores, cannot be authority for a proposition it could not have considered.

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V

The lead opinion herein, like the Court of Appeal below, sets out to answer the question posed--viz., whether the superior court's "official position" that Gerstein's promptness requirement, at least as defined by McLaughlin, is not applicable to juveniles, is contrary to the Fourth

Amendment--by addressing a question not posed--viz., whether the juvenile court law is compatible with "fundamental fairness" under the Fourteenth Amendment's due process clause. The fatal flaw of such analysis is evident: it is altogether nonresponsive. The lead opinion may just as well have attempted to determine whether the superior court's "official position" is contrary to the Fourth Amendment by considering whether the juvenile court law violates the Eighth Amendment's prohibition against cruel and unusual punishments.

Perhaps the lead opinion means to declare that whether and to what extent the Fourth Amendment is applicable to juveniles in the juvenile setting somehow implicates the due process clause of the Fourteenth Amendment. No reason or authority is presented in support of such a proposition. None is evident. The coverage of the Fourth Amendment, of course, is determined by the Fourth Amendment.

Certainly--notwithstanding the lead opinion's position--neither in Schall nor in Flores nor in any other case has the United States Supreme Court held that "Fourth Amendment claims pertaining to juvenile detentions following warrantless arrests for criminal activity" must be scrutinized under the due process clause of the Fourteenth Amendment. (Lead opn., ante, at p. 870 of 18 Cal.Rptr.2d, p. 1331-1332 of 849 P.2d; italics in original.) Rather, the court has simply addressed the claims made by the parties. So should we.

The lead opinion implies that Schall is "authoritative" on the Fourth Amendment standards governing the detention of juveniles. But at most, it is such only as to court-ordered preventive detention. Detention of this sort, however, is not what is involved here. The lead opinion assumes that the "authority" of Schall is unaffected by McLaughlin. But, as explained, in part relevant here the former does not even survive the latter.

The lead opinion suggests that Gerstein's promptness requirement, at least as defined by McLaughlin, is inapplicable

to juveniles because in juvenile proceedings the state assertedly acts as parens patriae to preserve and promote the welfare of the child, whereas in criminal actions it acts as enforcer of the criminal law to mete out punishment. The concurring opinion appears to be in accord.

Even if the lead opinion's premise is sound, its conclusion is simply incorrect. Whenever the state predicates detention on criminal activity--in whatever proceeding, under whatever role, or for whatever objective--probable cause is crucial for Fourth Amendment purposes. And whenever probable cause is crucial, Gerstein's promptness requirement, as defined by McLaughlin, is applicable. A prompt judicial probable cause determination generally within 48 hours of a juvenile's warrantless arrest--a determination that may be informal and nonadversarial--is altogether consistent with the juvenile court law, the goals of which include the expeditious resolution of issues in a relatively open and cooperative setting.

I recognize that under the juvenile court law, the state may detain a juvenile for reasons unrelated to criminal activity --although only in a separate nonsecure facility segregated from those suspected of crime (Welf. & Inst.Code, § 206)--as when the minor appears in public suffering from a sickness or injury that requires care (id., § 305, subd. (d)). In such a situation, Gerstein and McLaughlin are not implicated by their very terms. But such a situation does not obtain here.

In a word, when the state detains a person for criminal activity, it must establish probable cause. It is now settled that "[a] State has no legitimate interest in detaining . . . individuals who have been arrested without probable cause" generally beyond 48 hours. (County of Riverside v. McLaughlin, supra, __ U.S. at p. __,

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111 S.Ct. at p. 1669, italics added.) It is inconceivable that a "legitimate interest" could somehow spring into being when the individual in question turns out to be a juvenile.

The lead opinion also suggests that Gerstein's promptness requirement, at least as defined by McLaughlin, is inapplicable to juveniles because their interest in freedom from restraint of liberty under the Fourth Amendment is assertedly less substantial than that of adults. Here too, the concurring opinion appears to be in accord. But as stated, the basic criterion of the constitutional provision is "reasonableness." Extended restraint for a criminal offense in the absence of probable cause is no more reasonable for juveniles than adults. Arguably less so. In California at least, adults generally have the right to release on bail. (See Cal. Const., art. I, § 12; Pen.Code, § 1268 et seq.) Juveniles do not. (Aubry v. Gadbois (1975) 50 Cal.App.3d 470, 471-475, 123 Cal.Rptr. 365 (per Kaus, P.J.) [rejecting claims substantially based on, among other provisions, Cal. Const., art. I, § 12, and Pen.Code, § 1268 et seq.].) "[D]etaining . . . individuals who have been arrested without probable cause" beyond 48 hours is presumptively unreasonable. (County of Riverside v. McLaughlin, supra, __ U.S. at p. __, 111 S.Ct. at p. 1669.) It is unexplained how the individual's status as a juvenile can change the rule.

Similarly, the lead opinion suggests that Gerstein's promptness requirement, at least as defined by McLaughlin, is inapplicable to juveniles because restraint of liberty under the Juvenile Court Law is assertedly more limited than restraint of liberty under the criminal law. But what matters for Gerstein and McLaughlin is the fact of restraint and not its character. Indeed, as the Gerstein court itself observed, "Even pretrial release may be accompanied by burdensome conditions that effect a significant restraint of liberty." (Gerstein v. Pugh, supra, 420 U.S. at p. 114, 95 S.Ct. at p. 863, italics added.)

Most prominently, I believe, the lead opinion suggests that Gerstein's promptness requirement, at least as defined by McLaughlin, is inapplicable to juveniles because the juvenile court law assertedly has more "procedural safeguards" than the criminal law. The short answer is that none of these "protections" even purports to be an equivalent for a prompt judicial probable cause determination. Indeed, the provisions

cited by the lead opinion generally relate to the disposition of the detained juvenile within the juvenile system. They do not primarily concern whether the juvenile ought to have been detained within the system in the first place. That is the function of a prompt judicial probable cause determination. The cited "procedural safeguards" "protect" the juvenile who has been arrested without probable cause in much the same way as prison health and safety regulations "protect" an inmate who has been wrongfully convicted. They are too little, too late. In brief, they simply do not guarantee that a law-abiding juvenile wrongfully arrested without a warrant will regain his freedom within about 48 hours.

I acknowledge that in certain instances the probation officer appears obligated to investigate the question of probable cause. But, by definition, the prompt judicial probable cause determination mandated by the Fourth Amendment as construed by Gerstein and McLaughlin must be made by a judicial officer. Obviously, the probation officer is not such. He has responsibility to law enforcement, seeing that he is possessed of the "powers and authority conferred by law upon peace officers. . . ." (Welf. & Inst.Code, § 283.) The United States Supreme Court expressly recognized as much in Fare v. Michael C. (1979) 442 U.S. 707, 99 S.Ct. 2560, 61 L.Ed.2d 197, which dealt with the status of the probation officer under the juvenile court law. "[T]he probation officer is the employee of the State which seeks to prosecute the alleged offender. He is a peace officer, and as such is allied, to a greater or lesser extent, with his fellow peace officers. He owes an obligation to the State, notwithstanding the obligation he may also owe the juvenile under his supervision. In most cases, the probation officer is duty bound

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to report wrongdoing by the juvenile when it comes to his attention, even if by communication from the juvenile himself." (Id. at p. 720, 99 S.Ct. at p. 2569; accord, In re Michael C. (1978) 21 Cal.3d 471, 478-479, 146 Cal.Rptr. 358, 579 P.2d 7 (conc. opn. of Mosk, J.), revd. on other grounds sub nom. Fare v. Michael C., supra, 442 U.S. 707, 99 S.Ct. 2560.) The probation officer's "responsibility to law enforcement is

inconsistent with the constitutional role of a neutral and detached magistrate." (Gerstein v. Pugh, supra, 420 U.S. at p. 117, 95 S.Ct. at pp. 864-865.)

What the lead opinion may mean to suggest in alluding to the "procedural safeguards" of the juvenile court law is that, in Gerstein's words, "existing procedures . . . satisfy the requirement of the Fourth Amendment." (Gerstein v. Pugh, supra, 420 U.S. at p. 124, 95 S.Ct. at p. 868.) If it does, it is wrong. As stated, the cited "protections" simply do not guarantee that a law-abiding juvenile wrongfully arrested without a warrant will regain his freedom within about 48 hours.

The lead opinion next suggests that Gerstein's promptness requirement, at least as defined by McLaughlin, is inapplicable to juveniles because it is assertedly incompatible with the " 'informality' and 'flexibility' that characterize juvenile proceedings. . . ." (Schall v. Martin, supra, 467 U.S. at p. 263, 104 S.Ct. at p. 2409.) The concurring opinion again appears to be in accord. No such incompatibility, however, is apparent.

Plainly, the "informality" and "flexibility" of juvenile proceedings--both in American jurisdictions generally and in California specifically--are designed to make the process more expeditious than that of criminal actions, not less. The lead opinion's review proves the point as to the juvenile court law. Thus, if any colorable attack could be mounted against McLaughlin's definition of "promptness," it would be that it is too long, not too short.

Further, it is evident that a prompt judicial probable cause determination generally within 48 hours of a juvenile's warrantless arrest--like similar determinations routinely and quickly made on application for an arrest warrant--can readily be accommodated. I note that in a case such as this, the arresting officer must presently prepare a "concise written statement of . . . probable cause" "without necessary delay"--and specifically within 24 hours if the criminal offense in question is a misdemeanor. (Welf. & Inst.Code, § 626, subd.

(c) & (d).) I also note, in words from Gerstein, that "Because the standards [for arrest and detention] are identical, ordinarily there is no need for further investigation before the [judicial] probable cause determination can be made." (Gerstein v. Pugh, supra, 420 U.S. at p. 120, fn. 21, 95 S.Ct. at p. 866, fn. 21.) Evidently, a longer "period of detention" is not required for the state "to take the administrative steps incident to arrest" for a juvenile than for an adult. (Id. at p. 114, 95 S.Ct. at p. 863.) Indeed, at oral argument counsel for respondent effectively conceded the point.

It may be true, as the lead opinion asserts, that "when a minor is detained on suspicion of criminal activity, in contrast to an adult detained under similar circumstances, the inquiry into the propriety of the extended detention is much broader in scope than a determination, in the strict Fourth Amendment sense, of whether 'factual' probable cause exists to believe the minor committed the crime for which he was arrested." (Lead opn., ante, at p. 874 of 18 Cal.Rptr.2d, p. 1335 of 849 P.2d.) That the "inquiry" is "broader" than probable cause is a result of the Legislature's policy choice and not federal constitutional compulsion. But the fact remains: the "inquiry" does indeed depend on probable cause. To repeat: "A state has no legitimate interest in detaining . . . individuals who have been arrested without probable cause" generally beyond 48 hours (County of Riverside v. McLaughlin, supra, __ U.S. at p. __, 111 S.Ct. at p. 1669, italics added)--whether or not such individuals have attained the age of majority. Surely, the state may have a "legitimate interest" in continuing to detain juveniles who have been arrested without probable cause beyond 48 hours when there exists a supported basis for doing so separate and independent from the unsupported suspicion of

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criminal activity, as for example the presence of sickness or injury that requires care (see Welf. & Inst.Code, § 305, subd. (d)). In such cases, the state may continue to detain without implicating Gerstein and McLaughlin.

The foregoing assessment of the feasibility of a prompt judicial probable cause determination generally within

48 hours of a juvenile's warrantless arrest is confirmed by experience. Petitioner represents, without dispute, that a number of the state's largest counties, including San Diego, Orange, Santa Clara, Sacramento, San Francisco, Fresno, and San Mateo, are successfully providing determinations of this kind.

The lead opinion then suggests, most curiously, that Gerstein's promptness requirement, at least as defined by McLaughlin, is inapplicable to juveniles because the commands laid down by the United States Constitution should yield to the preferences indicated in California law. Here too, the concurring opinion appears to be in accord.

Of course, under the supremacy clause, the reverse is true.

Thus, the state may choose under the juvenile court law to fully investigate the circumstances of a detained juvenile, his parents, and his home before it decides whether and how to release him. (See Welf. & Inst.Code, § 628.) But it cannot extend the juvenile's detention as it pursues its investigation without a prompt judicial probable cause determination generally within 48 hours of his warrantless arrest--which establishes whether the juvenile should have been detained in the first place. To permit the state to grant itself such an extension would allow it to avoid the promptness requirement entirely--surely an untenable result. To repeat yet again: "A State has no legitimate interest in detaining . . . individuals who have been arrested without probable cause" generally beyond 48 hours (County of Riverside v. McLaughlin, supra, __ U.S. at p. __, 111 S.Ct. at p. 1669, italics added)--whether or not such individuals have attained the age of majority.

In any case, the state's furtherance of the choices it has decided to pursue under the juvenile court law is not adversely affected by the Fourth Amendment's mandate of a prompt judicial probable cause determination generally within 48 hours of a juvenile's warrantless arrest.

The experience in Orange County appears typical. In a letter in support of the petition for review, the Orange County Public Defender represented that "[i]n response to [McLaughlin], law enforcement agencies . . . prepare and submit single page pre-printed forms which, when completed, summarize the basis of a warrantless arrest"; the "arresting agency . . . submits a 'probable cause' sheet to Juvenile Hall intake officers when booking a minor"; twice a day when court is in session and once a day when it is not, a judicial officer reviews the " 'probable cause' sheets," either directly or over the telephone, and "makes the necessary determination"; "[t]hroughout the foregoing procedures, the minor's normal Juvenile Hall routine is never interrupted or delayed and no changes have been made in this routine as a result of the above McLaughlin procedure"; "[a]t no time is the minor transported to a courtroom or holding area in conjunction with a 'probable cause' determination"; "[a]t no time is the district attorney or public defender's office consulted as to any probable cause determination"; the "determination is non-adversarial and there are no court appearances by the minor, counsel or any law enforcement personnel."

Finally, the lead opinion implies that "promptness" for purposes of the prompt judicial probable cause determination mandated by the Fourth Amendment as construed by Gerstein and McLaughlin may be measured in terms of the time that is required for any given state to "take" whatever "steps" it chooses beyond those "incident to arrest" (Gerstein v. Pugh, supra, 420 U.S. at p. 114, 95 S.Ct. at p. 863). So too apparently the concurring opinion. That cannot be. As stated, a federal constitutional mandate that is designed to constrain the states cannot be dependent on such individual policy choices. Otherwise,

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that mandate would be rendered empty: each individual state would effectively be allowed to define "promptness" for itself.

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VI

For the reasons stated, I conclude that Gerstein's promptness requirement is indeed applicable to juveniles and that McLaughlin's definition of "promptness" does in fact operate in this setting.

From this conclusion, it follows that petitioner's systemic Fourth Amendment challenge to the superior court's "official position" that Gerstein's promptness requirement, at least as defined by McLaughlin, is not applicable to juveniles is successful.

I would therefore reverse the judgment of the Court of Appeal with directions to cause issuance of a peremptory writ of mandate compelling the superior court to comply with Gerstein's promptness requirement as defined by McLaughlin with regard to juveniles as well as adults.

In closing, I quote, with minor modifications, Justice Scalia's final words in his dissenting opinion in McLaughlin.

"Justice Story wrote that the Fourth Amendment 'is little more than the affirmance of a great constitutional doctrine of the common law.' . . . It should not become less than that. One hears the complaint, nowadays, that the Fourth Amendment has become constitutional law for the guilty; that it benefits the career criminal (through the exclusionary rule) often and directly, but the ordinary citizen remotely if at all. By failing to protect the innocent [juvenile] arrestee, today's [decision] reinforces that view. . . . Hereafter a law-abiding [juvenile] wrongfully arrested may be compelled to await the grace of a Dickensian bureaucratic machine, as it churns its cycle for up to [three] days--never once given the opportunity to show a judge that there is absolutely no reason to hold him, that a mistake has been made. In my view, this is the image of a system of justice that has lost its ancient sense of priority, a system that few Americans would recognize as our own." (County of Riverside v. McLaughlin, supra, __ U.S. at p. __, 111 S.Ct. at p. 1677, citation omitted (dis. opn. of Scalia, J.).)

Accordingly, I dissent.

KENNARD and GEORGE, JJ., concur.

GEORGE, Justice, dissenting.

I respectfully dissent.

I previously have expressed my view that generally worded constitutional and statutory provisions typically do not lend themselves to application through fixed, mechanical rules established by judicial decree. (With reference to the statutory mandate that an adult suspect be taken before a magistrate for arraignment without unnecessary delay and within two days of arrest, see Youngblood v. Gates (1988) 200 Cal.App.3d 1302, 1343-1350, 246 Cal.Rptr. 775 (dis. opn. of George, J.).) The United States Supreme Court has spoken in the present context, however, holding in County of Riverside v. McLaughlin (1991) __ U.S. __, __, 111 S.Ct. 1661, 1670, 114 L.Ed.2d 49, that a state's criminal statutory scheme does not comply with the Fourth Amendment unless it provides that a "person" (without differentiation between adults and juveniles) arrested and detained without a warrant will be afforded a judicial determination of probable cause within 48 hours of arrest. That federal constitutional rule is now settled and, of course, binding on this court. Although, as the lead opinion recognizes, the procedures constitutionally mandated in juvenile proceedings need not mirror in all respects the procedures required in adult criminal proceedings, I agree with Justice Mosk's conclusion that the People have not identified any state interest that would justify incarcerating a juvenile, who has been detained solely because law enforcement authorities believe he or she has committed a crime, for a period of time (before according the juvenile an impartial judicial determination of probable cause) longer than the time the state could detain an adult under similar circumstances. Indeed, in this context, I believe the need for a very prompt judicial determination of probable cause may be a more crucial factor in assessing the "reasonableness" of the "seizure" of a juvenile

than of an adult, because the consequences of even a relatively brief, wrongful incarceration are likely to be more detrimental and long-lasting to an innocent, vulnerable child than to an innocent adult. (See, e.g., In re William M. (1970) 3 Cal.3d 16, 31, fn. 25, 89 Cal.Rptr. 33, 473 P.2d 737.) In my view, the lead opinion's conclusion to the contrary is not supported either by Schall v. Martin (1984) 467 U.S. 253, 104 S.Ct. 2403, 81 L.Ed.2d 207, or the very recent decision in Reno v. Flores (1993) __ U.S. __, 113 S.Ct. 1439, 123 L.Ed.2d 1 because neither case purported to address the propriety of an extended detention of a juvenile who could be released to the custody of his or her family but has been detained solely because he or she is suspected of committing a crime.

[Since, due to grant of review, this opinion no longer appears in the Official Reports, the internal citations will be to the California Reporter]

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ALFREDO A., Petitioner,

v.

SUPERIOR COURT of the State of California
for the County of Los Angeles, Respondent.

PEOPLE of the State of California,
Real Party in Interest.

No. B060056.
Court of Appeal, Second District,
Division 3.

Dec. 5, 1991.
As Modified on Denial of
Rehearing Jan. 6, 1992.

Review Granted Feb. 20, 1992.

OPINION

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HINZ, Associate Justice.

INTRODUCTION

Petitioner seeks to conform juvenile court procedures regarding probable cause determinations for minors arrested without a warrant to the 48-hour period established for adult criminal matters by the United States Supreme Court. We deny the petition.

Petitioner Alfredo A., a minor taken into custody pursuant to Welfare & Institutions Code section 602,[1/] filed a petition for writ of habeas corpus on July 25, 1991. By its order to show cause filed July 26, 1991, Division Three of the Court of Appeal of the State of California, Second Appellate District, deemed the petition a petition for writ of mandate. The July 26, 1991, order directed respondent Los Angeles County Superior Court to show cause why a peremptory writ of mandate should not issue ordering it to apply a 48-hour period for determining probable cause to juvenile proceedings.

By a July 29, 1991, letter, the Los Angeles County Public Defender informed this court that on July 26, 1991, a juvenile petition was filed alleging that petitioner came within the provisions of section 602 by violating Health & Safety Code sections 11351.5 and 11351 on July 24, 1991. When petitioner appeared in court on the next judicial day, July 29, 1991, no detention report was provided to the juvenile court, which released the petitioner from custody. Time for arraignment was waived, and petitioner's arraignment was calendared for August 19, 1991.

ISSUES

Petitioner claims on appeal that:

1. The court should reach and resolve issues presented in this petition even if the matter becomes moot as to this particular petitioner; and that

2. A juvenile arrested without a warrant is in custody illegally if not provided with a prompt judicial determination of probable cause.

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1/ Unless otherwise specified, statutes in this opinion will refer to the Welfare & Institutions Code.

FACTS

The facts as alleged in the petition, undisputed by respondent, are as follows. Petitioner, a minor, was arrested without a warrant on July 24, 1991, and released after five days in custody.

On July 11, 1991, the Honorable Jaime R. Corral, Presiding Judge of the Los Angeles County Juvenile Court, sent a memorandum to all juvenile court judges, commissioners, and referees. The county counsel provided the juvenile court with an opinion about whether Riverside v. McLaughlin (1991) __ U.S. __, 111 S.Ct. 1661, 114 L.Ed.2d 49 requiring probable cause determinations no later than 48 hours after a warrantless arrest, applied to juveniles. The county counsel's opinion stated that McLaughlin " 'does not require probable cause hearings in California for juveniles under different circumstances than currently provided for in the Juvenile Court Law.' " Presiding Judge Corral and the supervising judges unanimously agreed that the juvenile court's official position would be consistent with the county counsel's opinion.

The petition contended that procedures followed in Los Angeles County Juvenile Court deprived petitioner and those held in similar circumstances of their liberty because he did not receive a prompt judicial determination of probable cause following his warrantless arrest. The petition further contended that petitioner has no speedy or adequate remedy at law. No judicial order exists requiring his detention, and neither an order of that kind nor the juvenile court's memorandum are appealable. The petition further alleges that it is filed in this court because it presents a question of law and because it would be fruitless to seek relief in the superior court, since that court's official policy requires his detention.

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DISCUSSION

Petitioner acknowledges that his release after five days in custody renders the petition moot as to him. As illustrated by events following the filing of the petition, in a pretrial detention case, termination of an appellant's claim does not render it moot. Since review usually takes longer than the temporary detention, the appellant, and others in similar circumstances, could be detained under the procedures challenged by this petition. Because the claim is "capable of repetition, yet evading review," it remains suitable for this court's review even if moot as to this petitioner. (Gerstein v. Pugh (1975) 420 U.S. 103, 110, fn. 10, 95 S.Ct. 854, 861, fn. 10, 43 L.Ed.2d 54; In re Talbott (1988) 206 Cal.App.3d 1290, 1292, 254 Cal.Rptr. 421.)

Gerstein held that states must provide ". . . fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty, and this determination must be made by a judicial officer either before or promptly after arrest." (Id., 420 U.S. at p. 125, 95 S.Ct. at p. 868.) In County of Riverside v. McLaughlin, the United States Supreme Court defined its task as clarifying what constitutes "prompt" determination of probable cause following a warrantless arrest. McLaughlin held: "[A] jurisdiction that provides judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement of Gerstein." (111 S.Ct. at p. 1670.) Weekends and holidays do not toll the 48-hour period. (Id., at p. 1671.)

This appeal raises the issue whether McLaughlin applies to juvenile court proceedings.

Subject to some exceptions not relevant to this appeal, California's statutory framework sets forth the following procedures. Without a warrant, a peace officer may take a minor into temporary custody when the officer has reasonable cause to believe the minor has violated a federal or state law or city or county ordinance. (§§ 625, subd. (a),

and 602.) By filing a petition, the prosecuting attorney commences juvenile court proceedings to declare a minor a ward of the court pursuant to section 602. (§ 650, subd. (b).) A minor taken into custody must be released within 48 hours, excluding nonjudicial days, unless a petition to declare the minor a ward has been filed. (§ 631, subd. (a).)

Section 632, subdivision (a) states: "Except as provided in subdivision (b), unless sooner released, a minor taken into custody under the provisions of this article shall, as soon as possible but in any event before the expiration of the next judicial day after a petition to declare the minor a ward or dependent child has been filed, be brought before a judge or referee of the juvenile court for a hearing to determine whether the minor shall be further detained. Such a hearing shall be referred to as a 'detention hearing.' "

Petitioner argues that because a petition need not be filed until 48 hours after arrest, and the minor need not be brought before court until the first judicial day after the petition is filed, a detention hearing can be delayed for a substantial period after a minor's arrest. Based on Gerstein and McLaughlin, petitioner claims that federal constitutional law requires an earlier probable cause determination than that provided by California's statutory scheme.

In Schall v. Martin (1984) 467 U.S. 253, 104 S.Ct. 2403, 81 L.Ed.2d 207 three juveniles had been detained for six, six, and more than seven days, respectively, before the equivalent of a detention hearing pursuant to the New York Family Court Act. (Id., at pp. 257-260, 104 S.Ct. at pp. 2406-2408.) The New York Family Court Act, it should be noted, gives the court authority to direct "preventive detention" of the juvenile at an "initial appearance." The statute permits a brief pretrial detention if the court finds a serious risk exists that an arrested juvenile may commit a crime before the return date for a probable cause hearing. (Id., at pp. 255-256, 263, 104 S.Ct. at pp. 2405-2406, 2409.) As the Schall opinion notes, California, like all other states, has an analogous preventive detention provision, section 628. (Id., at pp. 266-267, 104 S.Ct. at pp. 2410-2412.)

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Schall held, first, that pretrial detention of juveniles "promotes the interests both of society and the juvenile," and ". . . serves a legitimate regulatory purpose compatible with the 'fundamental fairness' demanded by the Due Process Clause in juvenile proceedings." (Id., at p. 268, 104 S.Ct. at p. 2412.) Schall held, second, that such pretrial detention of juveniles was a regulatory rather than a punitive measure, serving a legitimate state objective. (Id., at p. 274, 104 S.Ct. at p. 2415.)

Schall held, third, that given the procedural protections preceding its imposition, preventive detention did not violate the due process clause of the Fourteenth Amendment. (Id., at pp. 274-281, 104 S.Ct. at p. 2415-2419.) One of several factors underpinning this holding was that under the New York statute, "[t]he initial appearance may be adjourned for no longer than 72 hours or until the next court day, whichever is sooner, to enable an appointed law guardian or other counsel to appear before the court." (Id., at p. 275, 104 S.Ct. at p. 2416.) Schall further found that the failure to make a finding of probable cause at the initial appearance does not amount to a deprivation of due process. Hence a detained juvenile is entitled to a formal, adversarial probable-cause hearing within three days of the initial appearance, with one three-day extension possible for good cause shown. (Id., at pp. 276-277, 104 S.Ct. at pp. 2416-2417.)

Thus Schall approved a statutory scheme in which as many as six, or, on a showing of good cause, even nine days may elapse between the detention and a probable cause hearing. Gerstein similarly indicated approval of a pretrial detention procedure that supplies a probable-cause hearing within five days of the initial detention. (Gerstein v. Pugh, supra, 420 U.S. 103, 124, fn. 25, 95 S.Ct. 854, 868, fn. 25, 43 L.Ed.2d 54.)

Petitioner correctly points out that Schall stated that the issue of the propriety of detention for a period of as long as 72 hours before the initial appearance was not at issue in that case. (Schall v. Martin, supra, 467 U.S. at pp. 257-258,

fn. 5, 104 S.Ct. at pp. 2406-2407, fn. 5.) However, Schall also explored the differences between the criminal prosecution of adults and the very different objectives of juvenile proceedings. "We have held that certain basic constitutional protections enjoyed by adults accused of crimes also apply to juveniles. [2/] [Citations.] But the Constitution does not mandate elimination of all differences in the treatment of juveniles. [Citation.] The State has 'a parens patriae interest in preserving and promoting the welfare of the child,' [citation] which makes a juvenile proceeding fundamentally different from an adult criminal trial. We have tried, therefore, to strike a balance--to respect the 'informality' and 'flexibility' that characterize juvenile proceedings, [citation] and yet to ensure that such proceedings comport with the 'fundamental fairness' demanded by the Due Process Clause. [Citations.]" (Id., at p. 263, 104 S.Ct. at pp. 2409.)

In terms of the New York statutory scheme, Schall reiterated that the New York Family Court ". . . is charged not with finding guilt and affixing punishment, [citation] but rather with determining and pursuing the needs and best interests of the child insofar as those are consistent with the need for the protection of the community. [Citation.] Juvenile proceedings are, thus, civil rather than criminal, although because of the restrictions that may be placed on a juvenile adjudged delinquent, some of the same protections afforded accused adult criminals are also applicable in this context. [Citation.]" (Id., at p. 257, fn. 4, 104 S.Ct. at p. 2406, fn. 4.)

Schall indicates that custody is a due process right which juvenile court jurisdiction treats differently from adult criminal proceedings. Although a juvenile's interest in

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[2/] These protections include notice of charges, right to counsel, privilege against self-incrimination, right to confrontation and cross-examination, proof beyond a reasonable doubt, and double jeopardy. (Schall v. Martin, supra, 467 U.S. 253, 263, 104 S.Ct. 2403, 2409, 81 L.Ed.2d 207, and cases there cited.)

freedom from institutional restraints is "substantial," it ". . . must be qualified

[2 Cal.Rptr.2d 77]

by the recognition that juveniles, unlike adults, are always in some form of custody. [Citations.] Children, by definition, are not assumed to have the capacity to take care of themselves. They are assumed to be subject to the control of their parents, and if parental control falters, the State must play its part as parens patriae. [Citations.] In this respect, the juvenile's liberty interest may, in appropriate circumstances, be subordinated to the State's 'parens patriae interest in preserving and promoting the welfare of the child.' [Citation.]" (Id., at p. 265, 104 S.Ct. at p. 2410.)

California Juvenile Court Law likewise predicates itself on a "protective and rehabilitative philosophy" that distinguishes it from adult criminal law. (T.N.G. v. Superior Court (1971) 4 Cal.3d 767, 776, fn. 10, 94 Cal.Rptr. 813, 484 P.2d 981, quoting Report of the Governor's Special Study Commission on Juvenile Justice, Part I--Recommendations for Changes in California's Juvenile Court Law (1960).) This factor alone distinguishes the instant petition from McLaughlin. So do the procedures set forth in the statutory scheme for making custody determinations for minors who have been arrested. The statutes provide several choices available in determining custody of an arrested minor.

Section 626 authorizes an officer taking a minor into temporary custody to: release the minor; deliver or refer the minor to an agency with which the city or county has an agreement to provide shelter care, counseling, or diversion services; prepare a written notice to appear before the county probation officer, and after obtaining a written promise to appear from the minor, the minor's parent or guardian, or from a responsible relative, release the minor with notice to the probation officer; or to deliver custody of the minor to the probation officer along with a written statement of the probable cause for taking the minor into temporary custody. Section 626 concludes with a statement of policy: "In determining which disposition of the minor to make, the officer shall prefer the alternative which least restricts the

minor's freedom of movement, provided that alternative is compatible with the best interests of the minor and the community."

Section 627 requires an officer taking a minor before a probation officer or any other place of confinement to "take immediate steps to notify the minor's parent, guardian, or a responsible relative that such minor is in custody and the place where he is being held." Section 654 authorizes a probation officer, with the consent of the minor and parent or guardian, to "delineate specific programs of supervision for the minor . . . and attempt thereby to adjust the situation which brings the minor within the jurisdiction of the court . . . ."

Section 628 requires a probation officer to investigate the minor's circumstances and the facts surrounding the minor's being taken into custody. Section 628 requires the probation officer to release the minor immediately to a parent, guardian, or responsible relative unless one of several conditions exist: the minor needs parental care and has no one to provide it; the minor is destitute, lacks the necessities of life, or has no home; the minor's home is unfit because of negligent, cruel, depraved, or physically abusive parents or guardians; the minor must be detained because of immediate, urgent necessity to protect the minor or because of reasonable necessity to protect the person or property of another; the minor is likely to flee the court's jurisdiction; the minor has violated a juvenile court order; or the minor is physically dangerous to the public because of a mental or physical deficiency, disorder, or abnormality. Even if the minor meets one or more of these criteria for detention, if the probation officer believes that 24-hour secure detention is not necessary, the probation officer, subject to some exceptions and conditions, is required to release the minor to home supervision. (§ 628.1.)

If, on the other hand, the probation officer determines that the minor should be retained in custody, the officer must immediately file a petition and set the matter for hearing on

the detention calendar. (§ 630.) Unless a criminal complaint or a petition to declare the minor a ward has been filed,

the minor must be released within 48 hours after being taken into custody, excluding nonjudicial days. (§ 631, subd. (a).)

Section 631, subdivision (b) states in part: "In all cases involving the detention of a minor pursuant to this subdivision, any decision to detain the minor more than 24 hours shall be subject to written review and approval by a probation officer who is a supervisor as soon as possible after it is known that the minor will be detained more than 24 hours." Subdivision (c) requires that if a minor is held in custody for more than 24 hours is subsequently released and no petition is filed, the probation officer shall prepare and file within 72 hours after the minor is released a written explanation of why the minor was held in custody for more than 24 hours, with a copy sent to the parents, guardian, or other person having care or custody of the minor.

Finally, section 632, subdivision (a) states that "Except as provided in subdivision (b) unless sooner released, a minor taken into custody under the provisions of this article shall, as soon as possible but in any event before the expiration of the next judicial day after a petition to declare the minor a ward or dependent child has been filed, be brought before a judge or referee of the juvenile court for a hearing to determine whether the minor shall be further detained . . . ."

As we have noted in the quotation, supra, section 632 requires a detention hearing before the expiration of the next judicial day after a petition is filed, or in some cases within 48 hours after having been taken into custody, excluding nonjudicial days. Subdivision (c) states that if the minor is not brought before the juvenile court within the period prescribed by section 632, the minor shall be released.

These statutes provide procedural safeguards that accommodate the individual's right to liberty and the state's duty to control crime. They reflect the balance that must be

struck between the informality and flexibility of juvenile proceedings even as they comport with the fundamental fairness required by due process. The statutory scheme protects a minor's right to freedom, consistent with the state interest in protecting the minor and society.

We deny the petition.

DISPOSITION

The petition is denied.

KLEIN, P.J., and DANIELSON, J., concur.

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ALFREDO A., Petitioner,

v.

The SUPERIOR COURT of Los Angeles County,
Respondent.

The PEOPLE,
Real Party in Interest.

No. S024618.
Supreme Court of California,
In Bank.

March 18, 1994.

LUCAS, Chief Justice.

Petition for rehearing DENIED.

Mosk, J., Kennard, J. and George, J. are of the opinion the petition should be granted.

Opinion modified.

Panelli, Retired Associate Justice of the California Supreme Court, assigned by the acting Chairperson of the Judicial Council, participated.

VERBATIM QUOTES OF RELEVANT CALIFORNIA CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

California Constitution, article I, section 12:

"A person shall be released on bail by sufficient sureties, except for:

"(a) Capital crimes when the facts are evident or the presumption great;

"(b) Felony offenses involving acts of violence on another person when the facts are evident or the presumption great and the court finds based upon clear and convincing evidence that there is a substantial likelihood the person's release would result in great bodily harm to others; or

"(c) Felony offenses when the facts are evident or the presumption great and the court finds based on clear and convincing evidence that the person has threatened another with great bodily harm and that there is a substantial likelihood that the person would carry out the threat if released.

"Excessive bail may not be required. In fixing the amount of bail, the court shall take into consideration the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at the trial or hearing of the case.

"A person may be released on his or her own recognizance in the court's discretion."

California Penal Code section 853.6, subdivision (a):

"In any case in which a person is arrested for an offense declared to be a misdemeanor, including a violation of any city or county ordinance, and does not demand to be taken before a magistrate, that person shall, instead of being taken before a magistrate, be released according to the

procedures set forth by this chapter. If the person is released, the officer or superior shall prepare in duplicate a written notice to appear in court, containing the name and address of the person, the offense charged, and the time when, and place where, the person shall appear in court. If, pursuant to subdivision (i), the person is not released prior to being booked and the officer in charge of the booking or his or her superior determines that the person should be released, the officer or superior shall prepare a written notice to appear in a court."

California Penal Code section 853.6, subdivision (i):

"Whenever any person is arrested by a peace officer for a misdemeanor, that person shall be released according to the procedures set forth by this chapter unless one of the following is a reason for nonrelease, in which case the arresting officer may release the person, or the arresting officer shall indicate, on a form to be established by his or her employing law enforcement agency, which of the following was a reason for the nonrelease:

"(1) The person arrested was so intoxicated that he or she could have been a danger to himself or herself or to others.

"(2) The person arrested required medical examination or medical care or was otherwise unable to care for his or her own safety.

"(3) The person was arrested under one or more of the circumstances listed in Sections 40302 and 40303 of the Vehicle Code.

"(4) There were one or more outstanding arrest warrants for the person.

"(5) The person could not provide satisfactory evidence of personal identification.

"(6) The prosecution of the offense or offenses for which the person was arrested, or the prosecution of any other offense or offenses, would be jeopardized by immediate release of the person arrested.

"(7) There was a reasonable likelihood that the offense or offenses would continue or resume, or that the safety of persons or property would be imminently endangered by release of the person arrested.

"(8) The person arrested demanded to be taken before a magistrate or refused to sign the notice to appear.

"(9) There is reason to believe that the person would not appear at the time and place specified in the notice. The basis for this determination shall be specifically stated.

"The form shall be filed with the arresting agency as soon as practicable and shall be made available to any party having custody of the arrested person, subsequent to the arresting officer, and to any person authorized by law to release him or her for custody before trial."

California Welfare and Institutions Code section 602:

"Any person who is under the age of 18 years when he violates any law of this state or of the United States . . . is within the jurisdiction of the juvenile court, which may adjudge such person to be a ward of the court."

California Welfare and Institutions Code section 626:

"An officer who takes a minor into temporary custody under the provisions of Section 625 may do any of the following:

"(a) Release the minor.

"(b) Deliver or refer the minor to a public or private agency with which the city or county has an agreement or plan to provide shelter care, counseling, or diversion services to minors so delivered.

"(c) Prepare in duplicate a written notice to appear before the probation officer of the county in which the minor was taken into custody at a time and place specified in the notice. The notice shall also contain a concise statement of the reasons the minor was taken into custody. The officer

shall deliver one copy of the notice to the minor or to a parent, guardian, or responsible relative of the minor and may require the minor or the minor's parent, guardian, or relative, or both, to sign a written promise to appear at the time and place designated in the notice. Upon the execution of the promise to appear, the officer shall immediately release the minor. The officer shall, as soon as practicable, file one copy of the notice with the probation officer.

"(d) Take the minor without unnecessary delay before the probation officer of the county in which the minor was taken into custody, or in which the minor resides, or in which the acts take place or the circumstances exist which are alleged to bring the minor within the provisions of Section 601 or 602, and deliver the custody of the minor to the probation officer. The peace officer shall prepare a concise written statement of the probable cause for taking the minor into temporary custody and the reasons the minor was taken into custody and shall provide the statement to the probation officer at the time the minor is delivered to the probation officer. In no case shall the officer delay the delivery of the minor to the probation officer for more than 24 hours if the minor has been taken into custody without a warrant on the belief that the minor has committed a misdemeanor.

"In determining which disposition of the minor to make, the officer shall prefer the alternative which least restricts the minor's freedom of movement, provided that alternative is compatible with the best interests of the minor and the community."

California Welfare and Institutions Code section 628:

"(a) Upon delivery to the probation officer of a minor who has been taken into temporary custody under the provisions of this article, the probation officer shall immediately investigate the circumstances of the minor and the facts surrounding his being taken into custody and shall immediately release such minor to the custody of his parent, guardian, or responsible relative unless one or more of the following conditions exist:

"(1) The minor is in need of proper and effective parental care or control and has no parent, guardian, or responsible relative; or has no parent, guardian, or responsible relative willing to exercise or capable of exercising such care or control; or has no parent, guardian, or responsible relative actually exercising such care or control.

"(2) The minor is destitute or is not provided with the necessities of life or is not provided with a home or suitable place of abode.

"(3) The minor is provided with a home which is an unfit place for him by reason of neglect, cruelty, depravity or physical abuse of either of his parents, or of his guardian or other person in whose custody or care he is.

"(4) Continued detention of the minor is a matter of immediate and urgent necessity for the protection of the minor or reasonable necessity for the protection of the person or property of another.

"(5) The minor is likely to flee the jurisdiction of the court.

"(6) The minor has violated an order of the juvenile court.

"(7) The minor is physically dangerous to the public because of a mental or physical deficiency, disorder or abnormality.

"(b) In any case in which there is reasonable cause for believing that a minor who is under the care of a physician or surgeon or a hospital, clinic, or other medical facility and cannot be immediately moved is a person described in subdivision (d) of Section 300, the minor shall be deemed to have been taken into temporary custody and delivered to the probation officer for the purposes of this chapter while he is at the office of the physician or surgeon or such medical facility."

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California Welfare and Institutions Code section 631, subdivision (a):

". . . [W]henever a minor is taken into custody by a peace officer or probation officer . . . the minor shall be released within 48 hours after having been taken into custody, excluding nonjudicial days, unless within that period of time a petition to declare the minor a ward has been filed . . . ."

California Welfare and Institutions Code section 632:

"(a) Except as provided in subdivision (b), unless sooner released, a minor taken into custody under the provisions of this article shall, as soon as possible but in any event before the expiration of the next judicial day after a petition to declare the minor a ward or dependent child has been filed, be brought before a judge or referee of the juvenile court for a hearing to determine whether the minor shall be further detained. Such a hearing shall be referred to as a 'detention hearing.'

"(b) Whenever a minor is taken into custody without a warrant on the belief that he or she has committed a misdemeanor not involving violence, a threat of violence, or possession or use of weapons, if the minor is not currently on probation or parole, he or she shall be brought before a judge or referee of the juvenile court for a detention hearing as soon as possible, but no later than 48 hours after having been taken into custody, excluding nonjudicial days, after a petition to declare the minor a ward has been filed. In all cases involving the detention of a minor pursuant to this subdivision where the minor will not be brought before the judge or referee of the juvenile court within 24 hours, the decision not to bring the minor before the judge or referee within 24 hours shall be subject to written review and approval by a probation officer who is a supervisor as soon as possible after it is known that the minor will not be brought before the judge or referee within 24 hours. However, if the decision not to bring the minor before the judge or referee within 24 hours is made by a probation officer who is a

supervisor, the decision shall not be subject to review and approval.

"(c) If the minor is not brought before a judge or referee of the juvenile court within the period prescribed by this section, he or she shall be released from custody."

California Welfare and Institutions Code section 635:

". . . [U]nless it appears that . . . it is a matter of immediate and urgent necessity for the protection of such minor or reasonably necessary for the protection of the person or property of another that he be detained . . . , the court shall make its order releasing such minor from custody. [¶] The circumstances and gravity of the alleged offense may be considered, in conjunction with other factors, to determine whether it is a matter of immediate and urgent necessity for the protection of the minor or reasonably necessary for the protection of person or property of another that the minor be detained."

California Code of Civil Procedure section 135:

"Every full day designated as a holiday by Section 6700 of the Government Code, including that Thursday of November declared by the President to be Thanksgiving Day, is a judicial holiday, except September 9, known as 'Admission Day,' and any other day appointed by the President, but not by the Governor, for a public fast, thanksgiving, or holiday. If a judicial holiday falls on a Saturday or a Sunday, the Judicial Council may designate an alternative day for observance of the holiday. Every Saturday and the day after Thanksgiving Day is a judicial holiday. Officers and employees of the courts shall observe only the judicial holidays established pursuant to this section."

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California Government Code Section 6700:

"The holidays in this state are:

"(a) Every Sunday.
"(b) January 1st.
"(c) The third Monday in January, known as 'Dr. Martin Luther King, Jr. Day.'
"(d) February 12th, known as 'Lincoln Day.'
"(e) The third Monday in February.
"(f) The last Monday in May.
"(g) July 4th.
"(h) The first Monday in September.
"(i) September 9th, known as 'Admission Day.'
"(j) The second Monday in October, known as 'Columbus Day.'
"(k) November 11th, known as 'Veterans Day.'
"(l) December 25th.
"(m) Good Friday from 12 noon until 3 p.m.
"(n) Every day appointed by the President or Governor for a public fast, thanksgiving, or holiday.

"Except for the Thursday in November appointed as Thanksgiving Day, this subdivision and subdivision (c) shall not apply to a city, county, or district unless made applicable by charter, or by ordinance or resolution of the governing body thereof."

California Rules of Court, rule 987:

"When a judicial holiday specified by Code of Civil Procedure section 135 falls on a Sunday, the courts shall observe the holiday on the following Monday. When a judicial holiday specified by Code of Civil Procedure section 135 falls on a Saturday, the courts shall observe the holiday on the preceding Friday."

No. 93-2037

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

ALFREDO A., a Juvenile,

Petitioner,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

RESPONDENT'S BRIEF IN OPPOSITION

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No. 93-2037

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

ALFREDO A., a Juvenile,

Petitioner,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

RESPONDENT'S BRIEF IN OPPOSITION

Argument

1. Contrary to the inference in the Petition, juvenile detainees in California must receive a judicial determination of probable cause not later than 72 hours following arrest.

California's juvenile detention statutes, as construed by the California Supreme Court in the present case, mandate that juvenile detainees arrested without a warrant receive a judicial determination of probable cause not later than 72 hours following arrest. The judicial determination of probable cause will be accomplished within 72 hours following arrest by either (1) a full adversarial detention hearing, or, (2), if that hearing cannot be accomplished within that time, by a judicial determination of probable cause within 72 hours following arrest.

Contrary to the inference in the Petition, California's juvenile detention statutes, as construed by the California Supreme Court in the present case, do not allow a judicial determination of probable cause to be delayed longer than 72 hours under any circumstances.

In the first paragraph of his Statement of the Case, Petitioner states: "The arraignment may be delayed on weekends and holidays, and may thus occur as long as seven days after the juvenile's arrest."

The "arraignment," which is a full adversarial detention hearing which includes a probable cause determination, may be so delayed. However, the California Supreme Court has mandated that "if the 72-hour period immediately following arrest includes one or

more 'nonjudicial days,' such that the juvenile court is unable or unwilling to provide a full statutory detention hearing within that period, then the Constitution independently requires that the juvenile be afforded a separate, timely judicial determination of probable cause for any extended period of detention beyond the 72 hours following arrest." (***Alfredo A. v. Superior Court*** (1994) 6 Cal.4th 1215, 1232; Petition, page A-25)

2. The California Supreme Court decision is consistent with and not in conflict with applicable decisions of the United States Supreme Court.

The issue in this case is whether fundamental differences between adult and juvenile proceedings in California, including the different and more demanding procedural protection afforded juveniles, and the more complex post-arrest tasks and determinations that must be accomplished following arrest, justifies a conclusion that judicial determinations of probable cause within 72 hours of a juvenile's arrest complies with constitutional requirements, even though this Court has held that such a determination for adult detainees must generally be accomplished within 48 hours of arrest.

In ***Gerstein v. Pugh*** (1975) 420 U.S. 103, 43 L.Ed.2d 54, 95 S.Ct. 854, this Court held that a prompt judicial determination of probable cause is a prerequisite to an extended pretrial detention following a warrantless arrest. This Court did not mandate a specific timetable for the probable cause determination, recognizing "the desirability of flexibility and experimentation by the states." (420 U.S. at 123).

In *County of Riverside v. McLaughlin* (1991) 500 U.S. 44, 114 L.Ed.2d 49, 111 S.Ct. 1661, this Court concluded with regard to adults "that a jurisdiction that provides judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement of *Gerstein*. In reaching this conclusion, this Court balanced the state's public safety interest in immediate pretrial detention against the arrestee's interests in avoiding prolonged detention based on incorrect suspicion. (111 S.Ct. at 1668).

Neither *Gerstein* nor *McLaughlin* were juvenile detention cases, nor did either case balance the fundamentally different competing interests related to juvenile detention.

However, the intervening decision in *Schall v. Martin* (1984) 467 U.S. 253, 81 L.Ed.2d 207, 104 S.Ct. 2403, indicated that Fourth Amendment and related due process claims pertaining to the pretrial detention of juveniles following warrantless arrests for criminal activity cannot be viewed in the same light as similar challenges to adult detention, because juvenile proceedings are fundamentally different from adult criminal proceedings, requiring that a balance be struck between the informality and flexibility that characterize juvenile proceedings with the fundamental fairness demanded by the Due Process Clause. (*Schall, supra*, 467 U.S. at 263).

More recently, this Court has reaffirmed that the state's *parens patriae* interest in preserving and promoting the welfare of the child renders juvenile proceedings fundamentally different from adult criminal proceedings, and once again emphasized that "'juveniles,

unlike adults, are always in some form of custody,' ***Schall, supra***, [467 U.S.] at 265, and that where the custody of the parent or legal guardian fails, the government may (indeed, we have said *must*) either exercise custody itself or appoint someone else to do so. *Ibid.*" (***Reno v. Flores*** (1993) 507 U.S at ___, 123 L.Ed.2d 1, 17, 113 S.Ct. 1439; italics in original.)

Not only are there fundamental differences in purpose and procedure between the treatment of adult and juvenile detainees in California, but also the California Juvenile Court Law prescribes different, and more demanding procedures designed to ensure that an arrested juvenile will be released in accordance with well-established and codified policies at the earliest possible time following arrest, preferably to the custody of a parent or legal guardian. Although judicial determination of probable cause for juvenile detention may be delayed up to 24 hours longer than for adults, greater and more demanding non-judicial determinations of probable cause and the different needs for detention prior to that judicial review not only justify the additional time but are more likely to result in early release from detention than a judicial review of probable cause.

When a minor is arrested and detained on suspicion of having committed a crime, the minor is not formally charged with the crime in the sense that adult arrestees are criminally prosecuted. Rather, a determination is made whether to commence wardship proceedings with the filing of a petition by the prosecuting attorney pursuant to California Welfare &

Institutions Code section 602.[1]
(§ 650, subd. (c))

Various official functions must be performed at the time of the juvenile's arrest, and within the initial 72 hour period following the arrest--all designed to ensure that the detained minor is afforded every reasonable opportunity for release, preferably to a parent or guardian.

By statute, juvenile detention is to be avoided if possible, and if imposed, is fundamentally different than adult detention. The underlying policy is set forth in section 626, subdivision (d):

> "In determining which disposition of the minor to made, the officer shall prefer the alternative which least restricts the minor's freedom of movement, provided that alternative is compatible with the best interests of the minor."

Pursuant to that policy, the arresting officer may release the minor outright (§626, subd.(a)), deliver the minor to a public or private shelter facility (*id.*, subd. (b)), or release the minor on a written promise to appear before a county juvenile probation officer, or to a parent, guardian, or other responsible relative. (*Id.*, subd. (c)).

Accordingly, the juvenile procedures, which prefer release if possible even if there is probable cause, are more likely to result in early release that judicial

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[1]Unless otherwise indicated, all statutory references are to the California Welfare & Institutions Code.

probable cause determinations which permit extended detention any time probable cause is established.

Not only are the juvenile's liberty interests different than those of adults, but the circumstances permitting detention and the procedures afforded juveniles detained prior to judicial review of probable cause provide far greater protection against erroneous and unnecessary deprivations of liberty than is afforded to adults.

Only juveniles over the age of 14 years who present a serious security risk of harm to self or others may be securely detained in a law enforcement facility that contains a jail or lockup, and then for not longer than 6 hours, and only for temporary custody for the purpose of investigating the case, facilitating release or arranging transfer to an appropriate juvenile facility, unless the juvenile has been certified to be tried as an adult. (§207.1)

When secure detention in a juvenile hall is required, state law mandates that "[t]he juvenile hall shall not be in, or connected with any jail or prison and shall not be deemed to be nor be treated as a penal institution. It shall be conducted in all respects as nearly like a home as possible."
(§ 851)

If the arresting officer elects to deliver the minor to the juvenile probation officer for secure detention, the arresting officer is required to prepare a concise written statement of the probable cause for taking the minor into temporary custody, to be furnished along with the custody of the minor to the probation officer within 24

hours of the arrest (*Id.*, subd. (d)), and to "take immediate steps to notify the minor's parent, guardian, or responsible relative that such minor is in custody and the place where he is being held." (§627, subd. (a))

The juvenile probation officer is then required to "immediately investigate the circumstances of the minor and the facts surrounding his being taken into custody," and to "immediately release the minor to the custody of his parent, guardian, or responsible relative unless one or more ...[specified conditions] exist..." (§ 628)

If the probation officer does not find any of the conditions warranting detention specified in section 628 to exist, he must release the minor from custody. If one of the conditions is found to exist and the probation officer believes further detention is required he must within 48 hours of the time the minor was first taken into custody, file with the juvenile court a petition to declare the minor a ward of the court. If such a petition is not timely filed within 48 hours of the juvenile first being taken into custody, the juvenile must be released from custody (§ 631).

As construed by the California Supreme Court in the present case, the minor must be afforded a formal, adversarial "detention hearing" in juvenile court "as soon as possible but in any event" not later than the expiration 72 hours following arrest, unless a judicial review of probable cause has been sooner accomplished. (§ 632, subd. (a), as construed in ***Alfredo A. v. Superior Court***, *supra*, 6 Cal.4th at 1232.

As is evident from this summary, the determination whether to detain a minor following a warrantless arrest for criminal activity is a complex one, requiring consideration of various factors personal to the minor and his family situation (§628), and the application of several important statutory presumptions favoring the minor's early release, or, if extended detention is warranted, selection of the detention alternative most "compatible with the best interests of the minor ...," and "which least restricts the minor's freedom of movement" (§ 626). The place of detention is to be as "homelike" as possible. (§ 851)

Consistent with this Court's decisions in ***Schall*** and ***Flores***, the California Supreme Court balanced the fundamentally different interests affecting juvenile as opposed to adult detention, and appropriately concluded that a judicial determination of probable cause made not later than 72 hours following arrest will comply with the promptness requirement of ***Gerstein***.

Conclusion

The Petition for Certiorari should be denied.

Respectfully submitted,

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(3)

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No. 93-2037

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

ALFREDO A., a Juvenile,

Petitioner,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

MICHAEL P. JUDGE, PUBLIC DEFENDER
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ARGUMENT

I

RESPONDENT HAS FAILED TO JUSTIFY DELAYING A JUVENILE'S JUDICIAL DETERMINATION OF PROBABLE CAUSE DUE SOLELY TO AN INTERVENING WEEKEND OR HOLIDAY

Respondent superior court completely fails to address one of the two issues presented by this case. Petitioner has identified two constitutional infirmities in the California Supreme Court's ruling in Alfredo A. v. Superior Court, 6 Cal.4th 1212, 1232, 865 P.2d 56, 26 Cal.Rptr.2d 623 (1994). First, the California Supreme Court has permitted the judicial determination of probable cause ["PCD"] for a juvenile to be delayed for 72 hours, discussed below. Second, and equally important, the California Supreme Court has permitted the PCD to be delayed unnecessarily.

The California Supreme Court has held that the probable cause determination required by Gerstein v. Pugh, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975) may be conducted in conjunction with a juvenile's arraignment, and that if the arraignment is conducted within 72 hours, no earlier PCD is constitutionally required. Alfredo A. v. Superior Court, supra, 6 Cal.4th at p. 1232 (App., pp. A-24-25). However, California statutes permit that arraignment to be delayed solely due to an intervening weekend or holiday (which are "nonjudicial days"). Cal. Welf. & Inst. Code §§ 631, subd. (a), 632, subd. (a). Accordingly, under Alfredo A., the constitutionally mandated PCD can also be delayed solely due to the intervening weekend or holiday, so long as the PCD is ultimately conducted within 72 hours after arrest.

It is, perhaps, noteworthy that respondent superior court's discussion of the applicable time limits completely fails to mention the additional delays permitted for weekends and holidays. For example, respondent claims that a probation officer must file a petition to declare a minor a ward of the

court "within 48 hours of the time the minor was first taken into custody . . . ." Resp.Br., p. 7. However, the statute provides that the petition must be filed within 48 hours "excluding nonjudicial days." Cal. Welf. & Inst. Code § 631, subd. (b), emphasis added. Respondent asserts that all official functions must be performed "within the initial 72 hour period following the arrest . . . ." Resp.Br., p. 5. However, as petitioner has shown, that 72-hour period excludes "nonjudicial days."

Respondent superior court claims that petitioner has "inferred" that a PCD may be delayed for over 72 hours. Resp.Br., pp. 1-2. If such an implication can be found in the Petition, it was certainly not intended by petitioner. Instead, petitioner has described California's arraignment proceedings in order to demonstrate the constitutional defect in those proceedings and in the California Supreme Court's ruling: if a PCD is conducted in conjunction with an arraignment, then that PCD can be unnecessarily and unconstitutionally delayed solely due to an intervening weekend or holiday.

In County of Riverside v. McLaughlin, 500 U.S. 44, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991), this Court firmly held if a PCD is not conducted simply due to a weekend or holiday, the resulting delay is "unnecessary," constitutes "delay for delay's sake," and is constitutionally impermissible. Id., 500 U.S. 44, 111 S.Ct. at pp. 1670-1671. While it is the system which fails to guarantee PCDs within 48 hours which is subject to systemic attack, this Court made it clear that any unnecessary delay is constitutionally impermissible, even if the PCD is ultimately conducted within 48 hours:

"This is not to say that the probable cause determination in a particular case passes constitutional muster simply because it is provided within 48 hours. Such a hearing may nonetheless violate Gerstein if the arrested individual can prove that his or her probable cause determination was delayed unreasonably. Examples of unreasonable delay are delays for the purpose of gathering additional evidence to justify the arrest, a delay motivated by ill will against the arrested individual, or delay for delay's

sake." County of Riverside v. McLaughlin, supra, 500 U.S. 44, 111 S.Ct. at p. 1670, emphasis added. "Under Gerstein, jurisdictions may choose to combine probable cause determinations with other pretrial proceedings, so long as they do so promptly." Id., 111 S.Ct. at p. 1671, emphasis added.

Respondent superior court presents no arguments which could conceivably justify holding a juvenile in custody simply because he is arrested or held on a weekend. However, the California Supreme Court has expressly permitted a PCD to be delayed up to 72 hours, merely due to an intervening weekend or holiday, so that it may be conducted along with an arraignment. The California Supreme Court's authorization of such impermissible delay obviously cannot be justified. For this reason alone, this court should grant certiorari.

II

RESPONDENT HAS FAILED TO JUSTIFY DELAYING A JUDICIAL DETERMINATION OF PROBABLE CAUSE SIMPLY BECAUSE THE DETAINEE IS A JUVENILE

To a great extent, respondent superior court repeats the holding of the California Supreme Court, albeit in briefer form, that California's provisions for determining whether any particular juvenile should be detained, including "non-judicial determinations of probable cause" (Resp.Br., p. 4, emphasis added), justify delaying judicial determinations of probable cause for 72 hours, 24 hours longer than permitted for adults.

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Petitioner has already demonstrated the fallacy of this argument. See Pet., pp. 14-17. [1/]

However, one portion of respondent's argument should be addressed. Respondent asserts that it is permissible to delay the constitutionally required PCD for a juvenile because "greater and more demanding non-judicial determinations of probable cause and the different needs for detention prior to that judicial review not only justify the additional time but are more likely to result in early release from detention than a judicial review of probable cause." Resp.Br., p. 4. There are several propositions set forth in this statement, none of which support respondent's position.

Respondent's first claim is that there are "greater and more demanding non-judicial determinations of probable cause . . . ." Respondent cites nothing in support of this claim, which is simply untrue. The only determination of probable cause which needs to be made before a juvenile may be held in custody is that performed by the arresting officer. Cal. Welf. & Inst. Code § 626, subd. (d). Although the probation officer is to review the matter to determine whether the juvenile is subject to release pursuant to California Welfare and Institutions Code section 628, subdivision (a), nothing in California statutory law permits or requires anyone, including the probation officer, to review the arresting officer's determination that there is probable cause to believe the juvenile committed an offense prior to the juvenile's appearance in court. A police officer's probable cause determination is certainly neither a "greater" nor a "more demanding" determination of probable cause than is made by

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[1/] It is also ironic that respondent court refers to the provision of California Welfare and Institutions Code section 851 that a juvenile hall "shall not be treated as a penal institution" and shall be conducted "as nearly like a home as possible" (Resp.Br., p. 6), at the same time that Los Angeles County is constructing "the largest and most jail-like county youth facility in the nation . . . ." Los Angeles Times, Aug. 21, 1994, Pt. 1, pg. 1, col. 5.)

a magistrate. Most importantly, it is the same determination of probable cause which is made in the case of an arrested adult, who remains entitled to have that determination reviewed by a judicial officer without unnecessary delay and within no more than 48 hours.

Respondent's first claim is also irrelevant. The State could put in place myriad levels of non-judicial review of probable cause determinations, and still fail to satisfy the constitutional requirement that the question of probable cause be determined by a judicial officer. No matter how many executive officers may determine or redetermine the issue of probable cause, it still fails to supply the constitutionally required judicial determination of probable cause, and cannot justify delaying that constitutionally required judicial review.

Respondent's second claim is that there are "different needs for detention prior to judicial review . . . ." Respondent does not expand upon this obscure statement. If it is respondent's point that the State may have an interest in detaining a juvenile for reasons other than the juvenile's commission of a criminal offense, this is certainly true, but also irrelevant.

It is clearly correct to state that a minor may be detained based upon circumstances other than his commission of a crime, such as the absence of parents, or abuse by parents. However, the point at issue is that a juvenile cannot constitutionally be detained based upon commission of a criminal offense unless there is probable cause to believe he or she committed such an offense, which must be judicially determined. Indeed, whatever the juvenile's home situation may be, once the minor appears in court he must be released from detention based upon criminal charges if no probable cause is then demonstrated. Cal. Welf. & Inst. Code § 635.

The question presented by this case is not whether a juvenile may be detained under the otherwise applicable laws which permit a juvenile to be removed from his home for his own protection. The question is whether a juvenile may be

detained because he is accused of committing a crime in the absence of a prompt judicial determination that there is probable cause to believe the juvenile committed a crime.

In California there are, of course, legislative provisions for taking juveniles into protective custody in the absence of adequate parental supervision. See Cal. Welf. & Inst. Code § 300, et seq. Such juveniles are detained in facilities and under circumstances quite different from those applicable to juveniles accused of criminal offenses. Indeed, California law specifically prohibits housing those accused of crimes together with those in protective custody. Welf. & Inst. Code § 206. However, the issue addressed in this case is not whether a juvenile must be released if there is no probable cause for his continued detention based upon allegations that he engaged in criminal conduct, but when that release must take place.

If a juvenile is arrested for an offense, and there is no probable cause to believe the juvenile committed that offense, the juvenile must eventually be released from custody based upon the criminal accusation, even under Alfredo A. If the minor is in need of protective services after it is found that there is no probable cause to believe the juvenile engaged in criminal conduct, then the provisions of Welfare and Institutions Code section 300 may be invoked. However, the only question presented by this case is how long a juvenile may be held under the strictures inherent in a detention based upon criminal conduct.

It is obviously correct that a juvenile arrested for a criminal offense should not be released to abusive parents, whether or not the juvenile actually engaged in culpable conduct. However, that has nothing to do with the issue before this court. A juvenile found not guilty of an offense should not be released to abusive parents either. That certainly would not justify a law which permitted the continued detention of all juveniles found not guilty of criminal offenses. The point is that a juvenile accused of a crime cannot be detained upon the basis of such an accusation in the absence of a prompt judicial determination of probable cause.

The fact that there may be other grounds which would apply to protect a juvenile from abuse even if the juvenile had not committed a crime does not defeat or even address the proposition that a juvenile who is being held in custody upon the allegation that he committed a criminal act is entitled to a prompt judicial determination of probable cause for that allegation.

Indeed, the sooner it is determined that a minor was arrested without probable cause to believe he committed an offense, the sooner proceedings will be taken to protect the juvenile from further abuse, if that is necessary. Once it was determined that the juvenile had not committed an offense, a petition to protect the minor could immediately be filed pursuant to California Welfare and Institutions Code section 300. Most importantly, once it is determined that a there is no probable cause to believe a juvenile committed a crime, the juvenile can then be placed in a suitable protective setting. Such a juvenile has no place in a Juvenile Hall designed for those accused of crimes, and should be removed from Juvenile Hall as soon as possible, not after a three-day delay.

No consideration of the "different needs for detention" applicable to juveniles can possibly result in any logical or reasonable conclusion that the judicial determination of whether there is probable cause to believe a juvenile committed an offense may be or should be delayed. As Justice George forcefully stated in dissent below, "[T]he need for a very prompt judicial determination of probable cause may be a more crucial factor in assessing the 'reasonableness' of the 'seizure' of a juvenile than of an adult, because the consequences of a relatively brief, wrongful incarceration are likely to be more detrimental and long-lasting to an innocent, vulnerable child than to an adult." Alfredo A. v. Superior Court, supra, 6 Cal.4th at p. 1258, George, J., dis. (App., p. A-61).

Finally, respondent court asserts that the non-judicial procedures established by California statute are "more likely to result in early release from detention than a judicial review

of probable cause." This claim is also untrue, at least as applied to juveniles who are entitled to release because they have been arrested without probable cause, who are the only detainees under consideration in this case. Such a juvenile will not have been detained unless a police officer thought there was probable cause. Consequently, it will not be until a judicial officer reviews the matter that the juvenile will be released due to the absence of probable cause.

Moreover, the argument is irrelevant. It is true that some juveniles may be released for reasons other than a determination that there is or is not probable cause to believe they committed an offense. However, adults who can post bail will also be released whether or not they committed an offense, and sometimes earlier than a judicial probable cause determination could be made. The availability of bail certainly does not justify extending the detention of adults in custody who cannot post bail, but who have committed no offense.

Similarly, that a juvenile who has committed an offense might be released sooner is of cold comfort to a juvenile who has not committed an offense, but must languish in custody for an additional 24 hours before obtaining his rightful and inevitable release, because he is one of the many juveniles who are not released even after application of the statutes. The availability of procedures that may result in a minor's release whether or not an offense has been committed has no logical connection to the issue of whether a juvenile arrested without probable cause may be detained for 72 hours.

The point is that the concern in this case is not "early release," but detention without probable cause. Respondent superior court has failed to point to any state interest or any goal of the juvenile justice system which is advanced by detaining juveniles in custody without a judicial determination of probable cause for such detention, in excess of 48 hours, and when that delay is constitutionally unnecessary. Juveniles and adults who are arrested with probable cause will remain in custody no matter when the PCD is conducted, except for those adults who can post bail (an option

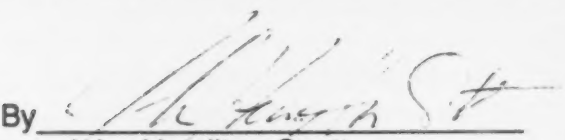
unavailable to juveniles). Thus, the sole result of the procedures authorized by the California Supreme Court, and defended by respondent superior court, is that juveniles arrested without probable cause may be held in custody longer than adults arrested without probable cause. There is no constitutional basis for such a distinction, nor any demonstrated need for the disparity. Accordingly, this Court should grant the pending petition for writ of certiorari.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

MICHAEL P. JUDGE, PUBLIC DEFENDER
OF LOS ANGELES COUNTY, CALIFORNIA

By 
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